CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, and Notices

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U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 27 JANUARY 21, 1993 NO. 3

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 93–1)

FOREIGN CURRENCIES

QUARTERLY RATES OF EXCHANGE: JANUARY 1 THROUGH MARCH 31, 1993

The table below lists rates of exchange, in United States dollars for certain foreign currencies, which are based upon rates certified to the Secretary of the Treasury by the Federal Reserve of New York under provisions of 31 U.S.C. 5151, for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Country	Name of currency	U.S. dollars
Australia	Dollar	$0.681800
Austria	Schilling	0.086806
Belgium	Franc	0.029691
Brazil	Cruzado	N/A
Canada	Dollar	0.782350
China, P.R.	Renminbi yuan	0.173424
Denmark	Krone	0.157505
Finland	Markka	0.185185
France	Franc	0.178747
Germany	Deutsche mark	0.610687
Hong Kong	Dollar	0.129166
India	Rupee	0.034483
Iran	Rial	N/A
Ireland	Pound	1.605500
Italy	Lira	0.000657
Japan	Yen	0.007974
Malaysia	Dollar	0.384025
Mexico	Peso	N/A
Netherlands	Guilder	0.543183
New Zealand	Dollar	0.512100
Norway	Krone	0.143451
Philippines	Peso	N/A
Portugal	Escudo	0.006771
Singapore	Dollar	0.605327
South Africa, Republic of	Rand	0.324992
Spain	Peseta	0.008585
Sri Lanka	Rupee	0.021668

FOREIGN CURRENCIES—Quarterly rates of exchange: January 1 through March 31, 1993 (continued):

Country	Name of currency	U.S. dollars
Sweden	Krona	$0.139198
Switzerland	Franc	0.676133
Thailand	Baht (tical)	0.039154
United Kingdom	Pound	1.501000
Venezuela	Bolivar	N/A

(LIQ–03–01 S:NISD CIE)

Dated: January 4, 1993.

MICHAEL MITCHELL,
Chief,
Customs Information Exchange.

(T.D. 93–2)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR DECEMBER 1992

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday: Friday, December 25, 1992.

Greece drachma:

December 1, 1992	$0.004834
December 2, 1992	.004854
December 3, 1992	.004822
December 4, 1992	.004765
December 7, 1992	.004817
December 8, 1992	.004863
December 9, 1992	.004850
December 10, 1992	.004795
December 11, 1992	.004796
December 14, 1992	.004805
December 15, 1992	.004819
December 16, 1992	.004843
December 17, 1992	.004811
December 18, 1992	.004785
December 21, 1992	.004790
December 22, 1992	.004731
December 23, 1992	.004714
December 24, 1992	.004694
December 28, 1992	.004681
December 30, 1992	.004654
December 31, 1992	.004637

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for December 1992 (continued):

South Korea won:

December 1, 1992	$0.001269
December 2, 1992	.001268
December 3, 1992	.001267
December 4, 1992	.001268
December 7, 1992	.001267
December 8, 1992	.001264
December 9, 1992	.001262
December 10, 1992	.001262
December 11, 1992	.001262
December 14, 1992	.001261
December 15, 1992	.001259
December 16, 1992	.001260
December 17, 1992	.001262
December 18, 1992	.001262
December 21, 1992	.001263
December 22, 1992	.001259
December 23, 1992	.001260
December 24, 1992	.001262
December 28, 1992	.001262
December 30, 1992	.001262
December 31, 1992	.001263

Taiwan N.T. dollar:

December 1, 1992	$0.039294
December 2, 1992	.039307
December 3, 1992	N/A
December 4, 1992	.039297
December 7, 1992	.039277
December 8, 1992	.039283
December 9, 1992	.039277
December 10, 1992	.039277
December 11, 1992	.039270
December 14, 1992	.039270
December 15, 1992	.039264
December 16, 1992	.039267
December 17, 1992	.039270
December 18, 1992	.039267
December 21, 1992	.039267
December 22, 1992	.039300
December 23, 1992	.039308
December 24, 1992	N/A
December 28, 1992	.039312
December 30, 1992	.039324
December 31, 1992	.039366

(LIQ–03–01 S:NISD CIE)

Dated: January 4, 1993.

MICHAEL MITCHELL,
Chief,
Customs Information Exchange.

(T.D. 93–3)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATES FOR DECEMBER 1992

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rates published in Treasury Decision 92–95 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Holiday: Friday, December 25, 1992.

Austria schilling:

December 1, 1992	$0.089807
December 2, 1992	.090416
December 3, 1992	.089884
December 4, 1992	.089008
December 7, 1992	.090621
December 8, 1992	.091366
December 9, 1992	.090498
December 10, 1992	.090090
December 11, 1992	.090123
December 14, 1992	.090400
December 15, 1992	.090662
December 16, 1992	.091429
December 17, 1992	.091095
December 18, 1992	.090719
December 21, 1992	.090703
December 22, 1992	.089646
December 23, 1992	.089111
December 24, 1992	.088928
December 28, 1992	.088437
December 30, 1992	.088075

Belgium franc:

December 1, 1992	$0.030713
December 2, 1992	.030893
December 3, 1992	.030713
December 4, 1992	.030469
December 7, 1992	.030989
December 8, 1992	.031230
December 9, 1992	.030931
December 10, 1992	.030722
December 11, 1992	.030807
December 14, 1992	.030960
December 15, 1992	.030931
December 16, 1992	.031240
December 17, 1992	.031153
December 18, 1992	.031037
December 21, 1992	.031037
December 22, 1992	.030656

FOREIGN CURRENCIES—Variances from quarterly rates for December 1992 (continued):

Belgium franc (continued):

December 23, 1992	$0.030506
December 24, 1992	.030423
December 28, 1992	.030266
December 30, 1992	.030184
December 31, 1992	.030075

China, P.R., reminbi yuan:

December 4, 1992	$0.172357
December 7, 1992	.172357
December 8, 1992	.171245
December 9, 1992	.171245
December 10, 1992	N/A
December 11, 1992	.170660
December 14, 1992	.170660
December 15, 1992	.169471
December 16, 1992	N/A
December 17, 1992	.169471
December 18, 1992	.170515
December 21, 1992	N/A
December 22, 1992	.172429
December 23, 1992	.172429
December 24, 1992	N/A

Denmark krone:

December 1, 1992	$0.162272
December 2, 1992	.163934
December 3, 1992	.162813
December 4, 1992	.161891
December 7, 1992	.164339
December 8, 1992	.165837
December 9, 1992	.164177
December 10, 1992	.162893
December 11, 1992	.162866
December 14, 1992	.165426
December 15, 1992	.165563
December 16, 1992	.166861
December 17, 1992	.165975
December 18, 1992	.165098
December 21, 1992	.165563
December 22, 1992	.162999
December 23, 1992	.162707
December 24, 1992	.162180
December 28, 1992	.161355
December 30, 1992	.160372
December 31, 1992	.159312

Finland markka:

December 1, 1992	$0.195886
December 2, 1992	.197044
December 3, 1992	.195925
December 4, 1992	.195503
December 7, 1992	.198926
December 8, 1992	.199920

FOREIGN CURRENCIES—Variances from quarterly rates for December 1992 (continued):

Finland markka (continued):

December 9, 1992	$0.197765
December 10, 1992	.196078
December 11, 1992	.195656
December 14, 1992	.196889
December 15, 1992	.196425
December 16, 1992	.196386
December 17, 1992	.194363
December 18, 1992	.193424
December 21, 1992	.194062
December 22, 1992	.191755
December 23, 1992	.190549
December 24, 1992	.190295
December 28, 1992	.190204
December 30, 1992	.190785
December 31, 1992	.190567

France franc:

December 1, 1992	$0.185460
December 2, 1992	.186498
December 3, 1992	.185925
December 4, 1992	.184332
December 7, 1992	.186986
December 8, 1992	.188430
December 9, 1992	.186602
December 10, 1992	.185185
December 11, 1992	.185443
December 14, 1992	.186881
December 15, 1992	.186637
December 16, 1992	.188129
December 17, 1992	.187512
December 18, 1992	.187091
December 21, 1992	.186654
December 22, 1992	.184655
December 23, 1992	.183773
December 24, 1992	.183402
December 28, 1992	.182432
December 30, 1992	.181620
December 31, 1992	.180930

Germany deutsche mark:

December 1, 1992	$0.632111
December 2, 1992	.636213
December 3, 1992	.632111
December 4, 1992	.625978
December 7, 1992	.637674
December 8, 1992	.642674
December 9, 1992	.636740
December 10, 1992	.632311
December 11, 1992	.634317
December 14, 1992	.637146
December 15, 1992	.637959
December 16, 1992	.643087
December 17, 1992	.640410
December 18, 1992	.638366

FOREIGN CURRENCIES—Variances from quarterly rates for December 1992 (continued):

Germany deutsche mark (continued):

December 21, 1992	$0.638081
December 22, 1992	.630120
December 23, 1992	.627156
December 24, 1992	.625313
December 28, 1992	.622007
December 30, 1992	.619579
December 31, 1992	.617398

Ireland pound:

December 1, 1992	$1.662000
December 2, 1992	1.679500
December 3, 1992	1.665000
December 4, 1992	1.654700
December 7, 1992	1.686000
December 8, 1992	1.702000
December 9, 1992	1.681000
December 10, 1992	1.658500
December 11, 1992	1.662200
December 14, 1992	1.685200
December 15, 1992	1.682000
December 16, 1992	1.696000
December 17, 1992	1.690500
December 18, 1992	1.684500
December 21, 1992	1.684000
December 22, 1992	1.666000
December 23, 1992	1.656000
December 24, 1992	1.652000
December 28, 1992	1.641600
December 30, 1992	1.631000
December 31, 1992	1.622700

Italy lira:

December 1, 1992	$0.000714
December 2, 1992	.000719
December 3, 1992	.000719
December 4, 1992	.000714
December 7, 1992	.000724
December 8, 1992	.000730
December 9, 1992	.000719
December 10, 1992	.000713
December 11, 1992	.000718
December 14, 1992	.000717
December 15, 1992	.000715
December 17, 1992	.000712
December 18, 1992	.000710
December 21, 1992	.000710
December 22, 1992	.000705
December 23, 1992	.000701
December 24, 1992	.000699
December 28, 1992	.000692
December 30, 1992	.000679
December 31, 1992	.000678

FOREIGN CURRENCIES—Variances from quarterly rates for December 1992 (continued):

Netherlands guilder:

December 1, 1992	$0.561924
December 2, 1992	.565643
December 3, 1992	.562366
December 4, 1992	.557010
December 7, 1992	.567698
December 8, 1992	.571984
December 9, 1992	.566958
December 10, 1992	.562588
December 11, 1992	.563730
December 14, 1992	.566604
December 15, 1992	.567376
December 16, 1992	.571788
December 17, 1992	.569379
December 18, 1992	.567859
December 21, 1992	.567344
December 22, 1992	.560224
December 23, 1992	.557414
December 24, 1992	.555864
December 28, 1992	.552853
December 30, 1992	.551481
December 31, 1992	.549753

New Zealand dollar:

December 1, 1992	$0.512000
December 2, 1992	.512700

Norway krone:

December 1, 1992	$0.154059
December 2, 1992	.155292
December 3, 1992	.154464
December 4, 1992	.153633
December 7, 1992	.155933
December 8, 1992	.157196
December 9, 1992	.156104
December 10, 1992	.147059
December 11, 1992	.146499
December 14, 1992	.148214
December 15, 1992	.148500
December 16, 1992	.150173
December 17, 1992	.149589
December 18, 1992	.148324
December 21, 1992	.147995
December 22, 1992	.148258
December 23, 1992	.147754
December 24, 1992	.147275
December 28, 1992	.146199
December 30, 1992	.144770
December 31, 1992	.143926

FOREIGN CURRENCIES—Variances from quarterly rates for December 1992 (continued):

Portugal escudo:

December 1, 1992	$0.007047
December 2, 1992	.007100
December 3, 1992	.007047
December 4, 1992	.007046
December 7, 1992	.007168
December 8, 1992	.007239
December 9, 1992	.007140
December 10, 1992	.007075
December 11, 1992	.007050
December 14, 1992	.007131
December 15, 1992	.007123
December 16, 1992	.007179
December 17, 1992	.007159
December 18, 1992	.007138
December 21, 1992	.007075
December 22, 1992	.006966
December 23, 1992	.006947
December 24, 1992	.006923
December 28, 1992	.006861
December 30, 1992	.006859
December 31, 1992	.006794

South Africa, Republic of, rand:

December 1, 1992	$0.332226
December 2, 1992	.333778
December 3, 1992	.333333
December 4, 1992	.332281
December 7, 1992	.333890
December 8, 1992	.335233
December 9, 1992	.333890
December 10, 1992	.332502
December 11, 1992	.332226
December 14, 1992	.332248
December 15, 1992	.332336
December 16, 1992	.332889
December 17, 1992	.333890
December 18, 1992	.332226
December 21, 1992	.332226
December 22, 1992	.331400
December 23, 1992	.331181
December 24, 1992	.331236
December 28, 1992	.329489
December 30, 1992	.327225
December 31, 1992	.327654

Spain peseta:

December 1, 1992	$0.008745
December 2, 1992	.008787
December 3, 1992	.008757
December 4, 1992	.008707
December 7, 1992	.008881
December 8, 1992	.009009
December 9, 1992	.008913
December 10, 1992	.008856

FOREIGN CURRENCIES—Variances from quarterly rates for December 1992 (continued):

Spain peseta (continued):

December 11, 1992	$0.008865
December 14, 1992	.008945
December 15, 1992	.008957
December 16, 1992	.009021
December 17, 1992	.008990
December 18, 1992	.008969
December 21, 1992	.008973
December 22, 1992	.008865
December 23, 1992	.008820
December 24, 1992	.008820
December 28, 1992	.008760
December 30, 1992	.008731
December 31, 1992	.008702

Sri Lanka rupee:

December 1, 1992	N/A
December 4, 1992	N/A
December 9, 1992	N/A
December 10, 1992	N/A
December 28, 1992	N/A

Sweden krona:

December 1, 1992	$0.147059
December 2, 1992	.147504
December 3, 1992	.147016
December 4, 1992	.146499
December 7, 1992	.148854
December 8, 1992	.149813
December 9, 1992	.147656
December 10, 1992	.147167
December 11, 1992	.147732
December 14, 1992	.147929
December 15, 1992	.147754
December 16, 1992	.146843
December 17, 1992	.143937
December 18, 1992	.144092
December 21, 1992	.144238
December 22, 1992	.142674
December 23, 1992	.141583
December 24, 1992	.141143
December 28, 1992	.140548
December 30, 1992	.141713
December 31, 1992	.141263

Switzerland franc:

December 1, 1992	$0.706714
December 2, 1992	.718649
December 3, 1992	.708466
December 4, 1992	.697253
December 7, 1992	.714286
December 8, 1992	.717618
December 9, 1992	.710732
December 10, 1992	.707965

FOREIGN CURRENCIES—Variances from quarterly rates for December 1992 (continued):

Switzerland franc (continued):

December 11, 1992	$0.711491
December 14, 1992	.709975
December 15, 1992	.709220
December 16, 1992	.715820
December 17, 1992	.713521
December 18, 1992	.708466
December 21, 1992	.707214
December 22, 1992	.696864
December 23, 1992	.693481
December 24, 1992	.690369
December 28, 1992	.687285
December 30, 1992	.685166
December 31, 1992	.682128

United Kingdom pound:

December 1, 1992	$1.535000
December 2, 1992	1.548000
December 3, 1992	1.565000
December 4, 1992	1.557000
December 7, 1992	1.586000
December 8, 1992	1.597500
December 9, 1992	1.569500
December 10, 1992	1.557000
December 11, 1992	1.557800
December 14, 1992	1.565000
December 15, 1992	1.566500
December 16, 1992	1.577200
December 17, 1992	1.574000
December 18, 1992	1.566000
December 21, 1992	1.564000
December 22, 1992	1.538500
December 23, 1992	1.526000
December 24, 1992	1.523000
December 28, 1992	1.511500
December 30, 1992	1.512000
December 31, 1992	1.513000

(LIQ–03–01 S:NISD CIE)

Dated: January 4, 1993.

MICHAEL MITCHELL,
Chief,
Customs Information Exchange.

(T.D. 93–4)

REVOCATION OF INDIVIDUAL BROKER LICENSE NO. 4063; KENNETH A. ANDERSON, JR.

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: Notice is hereby given that the Secretary of the Treasury, pursuant to Section 641, Tariff Act of 1930, as amended (19 U.S.C. 1641), and Part 111.74 of the Customs Regulations, as amended (19 CFR 111.74), revoked the individual broker license no. 4063 issued to Kenneth A. Anderson, Jr. This action having been upheld by the United States Court of International Trade (Court No. 90–11–00617); and, under appeal, by the Court of Appeals for the Federal Circuit (Appeal No. 92–1444 is effective as of November 28, 1992.

Dated: January 5, 1993.

THOMAS P. BANNER,
Acting Deputy Director,
Office of Trade Operations.

[Published in the Federal Register, January 11, 1993 (58 FR 3586)]

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 4

EXTENSION OF TIME LIMIT IN WHICH TO FILE VESSEL REPAIR DOCUMENTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations to extend the time limit allowed to vessel operators to file documentation submitted in connection with vessel repair entries, to include applications for relief from the assessment of duties under the vessel repair statute. It is also proposed that any shipyard cost estimates available be submitted at the time that a vessel repair entry is made.

DATE: Comments must be received on or before March 15, 1993.

ADDRESS: Written comments (preferably in triplicate) may be addressed to the Regulations and Disclosure Law Branch, Franklin Court, U.S. Customs Service, 1301 Constitution Avenue, NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Bruce Friedman, Office of Trade Operations, 202–343–0024 (operational matters), or Larry L. Burton, 202–482–6940 (legal matters).

SUPPLEMENTARY INFORMATION:

Background

Section 1466 of Title 19 of the United States Code provides that a duty of 50 per cent ad valorem shall be assessed upon the value of repairs accomplished outside of the United States on certain American-flag vessels. The statute itself, as well as numerous judicial and administrative interpretations, provides exceptions to the assessment of duty under specific circumstances.

The statutory mandate is implemented in section 4.14 of the Customs Regulations (19 CFR 4.14), which provides the necessary working guidelines for Customs as well as vessel operators. Among the matters set forth in section 4.14 are the procedures for making entry and for

seeking administrative refund or remission of assessed duty. It is required that American-flag vessels submit a vessel repair entry to Customs within 5 working days after arrival from a foreign port following any shipyard work. Depending upon whether actual shipyard invoices are available at the time an entry is submitted, the regulations provide that such entry may be denominated either a complete or incomplete submission.

The regulations currently provide that, absent the grant of an extension, in the case of incomplete entries documents providing a full and complete account of foreign shipyard costs incurred must be submitted to Customs within 60 days from the date of vessel arrival in the United States (19 CFR 4.14(b)(2)(ii)). Vessel repair liquidation units may extend this time by 30 days. Additional extensions must be approved by Customs Headquarters.

Comments have long been heard from vessel operators that the matter of final charges is frequently the subject of negotiation between themselves and foreign shipyards. It is claimed that this process often makes it impossible to meet the regulatory submission deadline without the necessity of seeking an extension from Customs. Customs has been reluctant to extend the filing period, recognizing that extending the period for the gathering of all evidence has the inevitable effect of delaying the eventual collection of the revenue. It appears, however, that such a delay already exists owing to the large number of operators seeking extensions, and that a savings to both vessel operators and Customs may be realized by not having to process numerous requests for extension. Customs is proposing, therefore, to extend the filing period from the current 60-day limit to a period of 90 days.

Customs is taking this opportunity to propose an additional amendment to the vessel repair regulations. In the case of vessel repair entries submitted as incomplete accounts, Customs requires that the best estimate of foreign repair costs must be provided pending receipt of actual final invoices. Such statements of cost are used to calculate the amount of the bond or duties estimated that must be deposited with Customs prior to departure of vessels from port.

It has been noted that, on some occasions, final invoice amounts are wildly divergent from initially estimated costs, and the revenue may be inadequately protected by small deposits or bonds. It is also known that, in many cases, estimates from foreign shipyards have been submitted to vessel operators prior to the commencement of repair operations. This is nothing more than sound business practice. Customs merely proposes to require that, when an estimate has been submitted to a vessel operator, the estimated cost filed at the time of submission of an incomplete vessel repair entry must reflect that estimate.

In addition, a cross reference to the bond provisions in Part 113, not revised when that part was revised, is corrected.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), section 1.4, Treasury Department Regulations (31 CFR 1.4), and section 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations and Disclosure Law Branch, U.S. Customs Service, Franklin Court, Suite 4000, 1099 14th Street NW, Washington, D.C.

REGULATORY FLEXIBILITY ACT

For the reasons set forth in the preamble and pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that, if adopted, the proposed amendments will not have a significant economic impact on a substantial number of small entities. Accordingly, they are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

DRAFTING INFORMATION

The principal author of this document was Larry L. Burton, Carrier Rulings Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 4

Customs duties and inspection, Reporting and recordkeeping requirements, Vessels.

PROPOSED AMENDMENTS

Accordingly, it is proposed to amend section 4.14 Customs Regulations (19 CFR 4.14), as set forth below.

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The general authority citation for Part 4 and the relevant specific authority citation for section 4.14 continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1624; 46 U.S.C. App. 3;

* * * * * * *

Section 4.14 also issued under 19 U.S.C. 1466, 1498;

* * * * * * *

§ 4.14 [Amended]

2. Section 4.14, paragraph (b)(1) is proposed to be amended by removing the reference "section 113.14(m)" and adding in its place, "section 113.13."

§ 4.14 Foreign equipment purchases by, and repairs to, American vessels.

* * * * * * *

(b) * * *

(2) * * *

3. Section 4.14, paragraph (b)(2) introductory text, is proposed to be amended by adding a new fifth sentence to read as follows:

* * * Estimated foreign shipyard costs in the possession of or known to the vessel operator at the time of filing the entry must be submitted with an entry marked as an incomplete account.

* * * * * * *

Section 4.14, paragraphs (b)(2)(ii), (b)(2)(ii)(B), and (d)(1)(ii), is proposed to be amended by removing the number "60" where it appears, and adding in its place, the number "90".

CAROL HALLETT,
Commissioner of Customs.

Approved: January 4, 1993.

PETER K. NUNEZ,
Assistant Secretary of the Treasury.

[Published in the Federal Register, January 13, 1993 (58 FR 4114)]

U.S. Court of Appeals for the Federal Circuit

NISSHO IWAI AMERICAN CORP., PLAINTIFF-APPELLANT *v.*
UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 92–1239

(Decided December 28, 1992)

Ned H. Marshak, Sharretts, Paley, Carter & Blauvelt, P.C., of New York, argued for plaintiff-appellant, with him on the brief was *Peter Jay Baskin*.

John J. Mahon, Department of Justice, argued for defendant-appellee, with him on the brief were *Stuart M. Gerson*, *David M. Cohen*, and *Joseph I. Liebman*. Of counsel was *Chi Choy*, U. S. Customs Service.

Appealed from: U.S. Court of International Trade.
Judge MUSGRAVE.

Before RICH, ARCHER, and LOURIE, *Circuit Judges*.

LOURIE, *Circuit Judge*.

Nissho Iwai American Corporation (NIAC) appeals from the judgment of the United States Court of International Trade granting the government's cross-motion for summary judgment and counterclaim on NIAC's challenge of a valuation determination by the United States Customs Service. *Nissho Iwai American Corp. v. United States*, Court No. 86–11–01439 (Ct. Int'l Trade February 28, 1992). In granting summary judgment, the trial court held that the transaction value of the imported merchandise at issue, as defined in 19 U.S.C. § 1401a(b)(1) (1988), was properly based on the price of the sale from the middleman to the ultimate United States purchaser. Because the transaction value in this case must be based on the price of the sale from the foreign manufacturer to the middleman, we reverse the trial court's grant of summary judgment. With respect to the government's counterclaim, the trial court held that a buying commission received by NIAC was not entitled to be deducted from dutiable value because there was no *bona fide* agency relationship. We affirm the trial court's grant of the government's counterclaim.

BACKGROUND

This appeal concerns the proper dutiable value of 205 rapid transit passenger cars imported to the United States from Japan during

1983–1985. The vehicles at issue were imported pursuant to a three-tiered distribution arrangement involving a manufacturer, Kawasaki Heavy Industries Ltd. (KHI), a middleman, Nissho Iwai Corporation (NIC), and a purchaser, the Metropolitan Transportation Authority of New York City (MTA). NIC and KHI are independent corporations organized under the laws of Japan. The MTA is a public benefit corporation of the State of New York.

In 1981, NIC and KHI conducted preliminary negotiations regarding the possible manufacture of subway cars by KHI for the MTA. By means of a contract dated March 17, 1982, the MTA agreed to purchase 325 passenger cars from NIAC, a wholly-owned U.S. subsidiary of NIC, for use in the New York City Transit System. Article VI-C of the contract specified that "the passenger cars to be furnished hereunder will be manufactured and produced by Kawasaki Heavy Industries, Ltd., Japan." The contract also stipulated that the vehicles would be manufactured using components from both the United States and Japan.[1] The MTA purchased the cars at the unit price of $844,500 per car as provided in Article VII-A(a) of the contract. On the same day the contract was entered into by the MTA and NIAC, NIAC assigned all of its rights and obligations under the contract to NIC pursuant to Article VI-A. KHI also signed a warranty of performance to the MTA and NIAC on that date.

Pursuant to a contract dated March 23, 1983, NIC placed an order with KHI for the production of the 325 passenger cars subject to the NIC/NIAC-MTA contract of March 17, 1982. Under the KHI-NIC agreement, KHI agreed to manufacture the 325 vehicles in Japan in accordance with the specifications of the NIC/NIAC-MTA contract, said vehicles to be delivered to NIC "FOB, Kobe Japan." The vehicles manufactured and delivered by KHI were specifically intended for sale to the MTA and could not be used for any other purpose. The payment by NIC to KHI was negotiated to be ¥80,002,100 per vehicle, plus escalation and change order payments determined under a formula specified in the NIC/NIAC-MTA contract.

The 325 passenger cars subject to the NIC/NIAC-MTA and KHI-NIC contracts were imported in sixteen entries from August 18, 1983 through June 27, 1985. Upon entry, the imported vehicles were classified under item 690.10, Tariff Schedules of the United States (TSUS),[2] dutiable (at the rate in effect at the time of each entry) on the full value of the imported merchandise less the cost or value of products of the United States included in such value pursuant to item 807.00, TSUS.

Duties were assessed by Customs on the basis of the "transaction value" of the imported vehicles, as that term is defined in 19 U.S.C.

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[1] The parties estimated that the cars would be comprised of 57.45% Japanese-made components and 42.55% American-made components.

[2] The Tariff Schedules of the United States were superseded by the Harmonized Tariff Schedules of the United States, effective January 1, 1989, pursuant to the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, 102 Stat. 1107 (Aug. 23, 1988). Neither party disputes that the imported merchandise is properly classified under item 690.10, TSUS.

§ 1401a(b)(1).[3] The transaction value of the first 120 passenger cars (the first eleven entries) was determined on the basis of the KHI-NIC sales price. The entry of those vehicles is not at issue.[4] The remaining 205 cars, however, were appraised by Customs at the price paid by the MTA to NIC/NIAC, less certain deductions which Customs considered appropriate.[5] Specifically, Customs determined that each of the imported vehicles at issue had a dutiable value of "US$542,036.45, per unit less appropriate duties net." Upon making the necessary duty deductions, the final dutiable value per vehicle was assessed at $497,737.61 for vehicles entered in 1983, $500,495.16 for vehicles entered in 1984, and $503,751.17 for vehicles entered in 1985.[6]

On August 4, 1983, NIAC protested Customs' appraisals of the value of the imported merchandise and requested that Customs issue a ruling holding that the dutiable value of the vehicles should be based on the price paid by NIC to KHI. Customs responded that it "was [initially] refraining from issuing a ruling in this case" because the issue whether the KHI-NIC sales price could represent the "relevant sale for exportation to the United States under 19 U.S.C. § 1401a(b)(1)" was "involved in a case which [was then] currently pending" before the Court of International Trade. That case was *American Air Parcel Forwarding Co. Ltd. v. United States*, 11 Ct. Int'l Trade 193, 664 F. Supp. 1434 (1987), *rev'd sub nom. E.C. McAfee Co. v. United States*, 842 F.2d 314, 6 Fed. Cir. (T) 92 (Fed. Cir. 1988).

The entries at issue were finally liquidated in December 1985. Customs adhered to its determination that the transaction value of the imported vehicles was represented by the contract price between the MTA and NIC/NIAC. NIAC commenced an action in the court of International Trade for reliquidation of the imported vehicles based upon the price paid by NIC to KHI. NIAC argued that this court's decision in *McAfee* mandates that the appraisal of the value of the imported vehicles be based on the price paid by the middleman to the manufacturer, *i.e.*, the KHI-NIC price.

Before the trial court, the parties filed cross motions for summary judgment on the reliquidation claim. Following the analysis of *Brosterhous, Coleman & Co. v. United States*, 737 F. Supp. 1197 (Ct. Int'l Trade

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[3] 19 U.S.C. § 1401a(b)(1) (1988) provides in pertinent part:

> The transaction value of imported merchandise is the price actually paid or payable for the merchandise when sold *for exportation to the United States*, plus amounts equal to—
>
> (A) the packing costs incurred by the buyer with respect to the imported merchandise;
> (B) any selling commission incurred by the buyer with respect to the imported merchandise;
> (C) the value, apportioned as appropriate, of any assist;
> (D) any royalty or license fee related to the imported merchandise that the buyer is required to pay, directly or indirectly, as a condition of the sale of the imported merchandise for exportation to the United States; and
> (E) the proceeds of subsequent resale, disposal, or use of the imported merchandise that accrue, directly or indirectly, to the seller. [Emphasis added.]

The price is also subject to certain deductions specified in § 1401a(b)(3)(A)–(B).

[4] NIAC also paid $884,655.99 in additional duties that were attributable to the entries liquidated at the KHI-NIC sales price. The government has abandoned its claim to those additional duties.

[5] In determining the final dutiable value per vehicle, Customs deducted a total of $347,355.32 from each vehicle for various nondutiable costs, charges, and payments associated with the price paid by the MTA to NIC/NIAC.

[6] The final dutiable value of each vehicle was determined by deducting from $542,036.45 duties of 8.9% for 1983 entries, 8.3% for 1984 entries, and 7.6% for 1985 entries.

1990), the court determined that the contract between the MTA and NIC/NIAC "was the contract which most directly caused the goods to be exported to the United States" and thus held that the value of the vehicles was properly based on the NIC/NIAC-MTA contract price. The court also found that NIAC was not a *bona fide* buying agent and concluded that a commission paid by NIC to NIAC for procuring American-made components subject to a duty exemption under item 870.00, TSUS could not be deducted from the NIC/NIAC-MTA sales price.

DISCUSSION

On appeal to this court, NIAC argues that the trial court failed to follow the holding in *McAfee* that the price of the initial sale from the manufacturer to the middleman must be used for appraisal, not the price of the sale from the middleman to the purchaser. NIAC further contends that the trial court erred in granting the government's counterclaim. We review the trial court's grant of summary judgment for correctness as a matter of law, deciding *de novo* the proper interpretation of the governing statute and regulations. *Guess? Inc. v. United States,* 944 F.2d 855, 857 (Fed. Cir. 1991).

I. *Transaction Value:*

The parties do not dispute that the imported vehicles must be appraised on the basis of "transaction value." The transaction value of imported merchandise is defined in Section 402(b)(1) of the Tariff Act of 1930, as amended by section 201 of the Trade Agreements Act of 1979, codified at 19 U.S.C. § 1401a(b)(1), as the "price actually paid or payable for the merchandise when sold for exportation to the United States," subject to certain additions and deductions as noted earlier. The primary issue here is whether the trial court erred in determining that the NIC/NIAC-MTA contract price is the price actually paid or payable for the imported vehicles when sold for exportation to the United States.

McAfee similarly involved a three-tiered system for distributing custom-made clothing assembled in Hong Kong to purchasers in the United States. Under this system, purchasers' orders for the clothing were taken by a distributor who then contracted with tailors in Hong Kong to produce the clothing. Upon receipt of the completed clothing, the distributor imported the items into the United States and forwarded them to the purchasers. The clothing entries were liquidated pursuant to an assessment of transaction value based on the price to the U.S. purchasers rather than the price paid by the distributor to the Hong Kong manufacturers.

The principal issue addressed by the court in *McAfee* concerned the proper transaction value of the imported merchandise. In resolving that issue, the court in *McAfee* essentially addressed two separate questions: (1) whether the sale between the manufacturer and the middleman[7] involved merchandise that was "for exportation to the United States," and

[7] There was no dispute that the sale between the middleman and the purchaser could serve as a statutorily proper basis for valuation.

if so, (2) which of the two possible sales prices (*i.e.*, the price paid by the middleman or the price paid by the purchaser) was proper for valuation purposes.

Regarding the first question, the court determined that "[w]here clothing is made-to-measure for individual United States customers and ultimately sent to those customers, the reality of the transaction between the distributors and the tailors is that the goods, at the time of the transaction between the distributors and tailors, are 'for exportation to the United States.'" 842 F.2d at 319, 6 Fed. Cir. (T) at 98. Upon concluding that the merchandise sold by the manufacturers to the middleman was made for exportation to the United States, the court was then faced with deciding which price should be used as the basis for appraising the transaction value.

In addressing that question, the court found guidance from *United States v. Getz Bros. & Co.*, 55 CCPA 11 (1967), a decision binding upon us in which the determination of transaction value of imported merchandise in the context of a three-tiered distribution was also involved. As the court in *McAfee* succinctly stated:

> [t]he issue in *Getz* was whether valuation of certain plywood should be at the manufacturer's price to a foreign middleman or that middleman's price to the United States customer. Two holdings in that case are significant here. First, a sale need not be to purchasers located in the United States to provide the basis for valuation. Second, *if the transaction between the manufacturer and the middleman falls within the statutory provision for valuation, the manufacturer's price, rather than the price from the middleman to his customer, is used for appraisal.* [Citations omitted.]

McAfee, 842 F.2d at 318, 6 Fed. Cir. (T) at 97 (emphasis added). Following the holdings of *Getz*, the court in *McAfee* held that the transaction value of the imported garments should have been determined on the basis of the Hong Kong tailors' assembly price, rather than on the basis of the price paid by the U.S. purchasers to the distributor.

Although the court in *McAfee* recognized that "[a] determination that goods are being sold or assembled for exportation to the United States is fact-specific and can only be made on a case-by-case basis," *id.* at 319, 6 Fed. Cir. (T) at 98, that caveat pertains specifically to determining whether a certain sales price falls within the statutory definition of transaction value under 19 U.S.C. § 1401a(b)(1). However, once it is determined that both the manufacturer's price and the middleman's price are statutorily viable transaction values, the rule is straightforward: the manufacturer's price, rather than the price from the middleman to the purchaser, is used as the basis for determining transaction value. Indeed, the court noted that

> * * * if the importer establishes that his claimed, lower valuation falls within the statute, the importer is entitled to the benefit of that valuation even though Customs' valuation also satisfies the same statutory requirements. While an argument could be made

> that Customs should have the option to impose the higher duty in such circumstances, * * * precedent is to the contrary.

Id. at 318, 6 Fed. Cir. at 97.

The government argues that the so-called "first sale" rule of *Getz* and *McAfee* should not apply to every case where there is a manufacturer, a middleman, and a purchaser, regardless of the facts involved. We agree. Conceivably, mechanical application of the rule whenever there is a three-tiered distribution system could lead to inequitable results where the manufacturer's price is set artificially low. However, the rule only applies where there is a legitimate choice between two statutorily viable transaction values. The manufacturer's price constitutes a viable transaction value when the goods are clearly destined for export to the United States and when the manufacturer and the middleman deal with each other at arm's length, in the absence of any non-market influences that affect the legitimacy of the sales price. As the government itself recognizes, that determination can only be made on a case-by-case basis. In this case, the vehicles that were the subject of the KHI-NIC contract were manufactured for a specific United States purchaser, the MTA. They were unquestionably intended "for exportation to the United States" and had no possible alternative destination.

At trial, the government argued that the transaction between KHI and NIC did not fall within the statutory definition of transaction value because the sales price negotiated between KHI and NIC was not the product of arm's length bargaining. The trial court, however, rejected the government's allegations that KHI and NIC were "related parties" under 19 U.S.C. § 1401a(g) and that there was no sale for exportation between KHI and NIC. The court determined that the "agreements between NIC and KHI were [not] of a different nature from the foreign transactions in either *Getz* and *McAfee*." Slip Op. at 12.

On appeal, the government contends that the price paid by NIC to KHI under the KHI-NIC contract cannot represent the correct appraised transaction value of the imported vehicles because that contract did not involve the sale of complete vehicles. According to the government, KHI did not "own" the U.S.-made components found in the imported vehicles and thus the contract between KHI and NIC only involved the sale of the vehicles' Japanese-made components. In support of its position, the government relies on Article 3 of the KHI-NIC contract, which provided that the price negotiated between KHI and NIC of ¥80,002,100 per vehicle was subject to change with any change in the quantity of Japanese-made components as compared to U.S.-made components. We reject the government's contention.

Under the KHI-NIC contract, KHI agreed to manufacture 325 rapid transit passenger vehicles in accordance with the contract between NIC/NIAC and the MTA, and NIC agreed to pay for them. Although KHI was required to use a specified quantity of U.S.-made components in the fabrication of the vehicles, that requirement did not render the contract as merely one for the sale of components made in Japan. A breakdown

between the Japanese and American content of the vehicles was necessary for purposes of establishing financing credit from the Export-Import Bank of Japan. Any change in the content ratio would have an effect on such credit, and thus the KHI-NIC contract provided for compensatory price adjustments. The government has failed to establish that the use of U.S.-made components in the manufacture of the imported vehicles in any way undermined the legitimacy of the price negotiated between KHI and NIC for the purchase of the completed vehicles or that the sales price did not accurately reflect the price that would exist in a true arm's length transaction.

Accepting that both the manufacturer's price and the middleman's price may serve as the basis of transaction value, the critical issue on appeal here centers upon which price is legally proper. In view of the controlling and binding authority of *McAfee,* we hold that the transaction value of the imported passenger cars at issue must be based on the KHI-NIC contract price. *See also Generra Sportswear Co. v. United States,* 905 F.2d 377, 381 n.7 (Fed. Cir. 1990).

The trial court, however, determined that *McAfee* was distinguishable from the instant case and thus did not consider it controlling authority in appraising the transaction value of the imported vehicles. Instead, the court employed the analysis set forth in *Brosterhous,* 737 F. Supp. 1197 (Ct. Int'l Trade 1990), in determining that the transaction value should be based on the price paid by the purchaser. We agree with NIAC that the trial court committed reversible error in failing to follow the controlling authority of *McAfee.*

Although the trial court cited differences in the material facts of *McAfee,* none supports its conclusion that those differences mandate a different result. The trial court determined that *McAfee* is inapplicable because it involved "assembled merchandise" within the meaning of 19 C.F.R. § 152.103[8] and did not involve the valuation of manufactured goods. The court found that KHI had an interest in the imported vehicles other than as an assembler because KHI was extensively involved in the negotiations with the MTA and that KHI possessed a significant stake in the ensuing contract between MTA and NIAC. That distinction, however, does not take this case out from under the rule of *McAfee.* In fact, it emphasizes KHI's role in the export of the vehicles to the United States, supporting the conclusion that its sale to NIC is the legally-controlling transaction.

The ultimate issue in *McAfee* was whether the assembly price of the imported merchandise, rather than the price paid by the purchaser, should serve as the basis for determining transaction value. Similarly, the critical issue here is whether the sales price paid by NIC to KHI should serve as the basis for appraising the transaction value of the im-

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[8] 19 C.F.R. § 152.103(a)(3) (1992) provides:

Assembled merchandise. The price actually paid or payable may represent an amount for assembly of imported merchandise in which the seller has no interest other than as the assembler. The price actually paid or payable in that case will be calculated by the addition of the value of the components and required adjustments to form the basis for the transaction value.

ported vehicles. *McAfee* speaks directly to that question and answers it in the affirmative. That case is not only applicable here, it is dispositive.

In the interest of clarifying the law, we consider it necessary to examine the case of *Brosterhous, Coleman & Co. v. United States,* 737 F. Supp. 1197 (Ct. Int'l Trade 1990), upon which the trial court relied in reaching its decision. The court in *Brosterhous* held that where there are two transactions that can be considered to be sales for importation to the United States, "Customs policy is that transaction value should be calculated according to the sale which most directly caused the merchandise to be exported to the United States." *Id.* at 1199.

The U.S. Customs Service issued a seminal ruling in CLA-2 CO:R:CV:V, 542928 BLS, TAA #57, C.S.D. 83–46, 17 Cust. B. 811 (January 21, 1983) in which it stated its position that "the transaction to which the phrase 'when sold for exportation to the United States' refers when there are two or more transactions which might give rise to a transaction value, is the transaction which most directly causes the merchandise to be exported to the United States." C.S.D. 83–46, 17 Cust. B. at 813. In so ruling, Customs acknowledged that under 19 U.S.C. § 1401a(b), as it existed before amendment by the Trade Agreements Act of 1979, "it was possible to use as the sale for exportation to the United States for purposes of determining statutory export value a sale from a foreign seller to a foreign buyer, who in turn sold the merchandise to a United States importer." However, Customs departed from that view because the Trade Agreements Act replaced "export value" with "transaction value" as the primary basis for valuation. Thus Customs concluded that "[c]ases decided under the prior law are not, therefore, necessarily precedent under the [Trade Agreements Act]." C.S.D. 83–46, 17 Cust. B. at 813.

We reject the Customs Service's rationale as being legally unsound. A similar argument was rejected by the court in *McAfee,* which recognized that "the language of the earlier statute is not significantly different from the * * * provision of the current statute." *McAfee,* 842 F.2d at 318, 6 Fed. Cir. at 97. We agree with NIAC that the 1979 amendment did not change the operative language of the statutory provision for valuation which requires that the sale be "for exportation to the United States." Further, we can discern nothing in the legislative history of the 1979 amendment that suggests that Customs, in determining the transaction value of imported merchandise, should undertake an investigation focusing on which of two transactions most directly caused the exportation. The "Customs policy" followed by *Brosterhous* proceeds from an invalid premise. To the extent *Brosterhous* is inconsistent with this court's decision in *McAfee* by requiring a weighing of the relative importance of two viable transactions, it is overruled. *See Strott v. Derwinski,* 964 F.2d 1124, 1128 (Fed. Cir. 1992).

II. *The Government's Counterclaim:*

Having concluded that the transaction value of the imported vehicles at issue is properly based on the price paid by NIC to KHI, we now ad-

dress the issue whether the trial court erred in granting the government's counterclaim. In granting summary judgment in favor of the government on the reliquidation claim, the trial court granted the government's counterclaim alleging that certain amounts, *viz.*, a commission paid by NIC to NIAC, financing costs, and insurance costs, were improperly deducted from the dutiable value of the imported vehicles. On appeal, NIAC only contests the dutiability of the commission it received from NIC as compensation for NIAC's services in procuring U.S.-made components entitled to duty exemption under item 807.00, TSUS.

Pursuant to an agreement between NIC and NIAC dated March 17, 1982, NIC agreed to pay NIAC a commission of 2.5% "of the delivered cost to NIAC as reflected in the purchase order * * * of all American made fabricated components purchased by NIAC for sale to NIC, which were furnished free of charge to KHI for incorporation into the R-62 cars." Under this agreement, NIAC received $2,356,294.78 from NIC as compensation for the cost of shipping the U.S.-made components to Japan. Upon liquidation, Customs deducted $6,568.87 per car from the dutiable value to reflect the deductible buying commission.

At trial, the government argued that the commission deduction was improper. The trial court agreed, relying on *Rosenthal-Netter, Inc. v. United States,* 12 Ct. Int'l Trade 77, 679 F. Supp. 21 (1988), *aff'd, adopted,* 861 F.2d 261, 7 Fed. Cir. (T) 11 (Fed. Cir. 1988). It concluded that in order to qualify for a deductible buying commission, there must be an agency relationship and that no such agency relationship existed between NIC and NIAC. The trial court based its finding that NIAC was not a *bona fide* buying agent of NIC on the March 17, 1982 agreement between NIC and NIAC. Article 12 of that agreement, entitled "Independence," provided in pertinent part that "NIAC is and shall be at all times an independent contractor and shall not be deemed to be an agent or employee of NIC for any purpose whatsoever." Accordingly, the trial court held that "[b]ecause NIAC was not NIC's agent, the commissions are not entitled to be deducted from dutiable value." Slip Op. at 13.

On appeal, NIAC argues that the government failed to overcome the presumption that the deductions from dutiable value allowed by Customs at the time of liquidation are correct. Moreover, NIAC claims that under long-standing policy of the Customs Service, all payments directly allocable to American-made components must be deducted from appraised value, regardless whether NIAC was NIC's buying agent or an independent contractor. We are unpersuaded by NIAC's arguments in view of the binding authority of *Rosenthal-Netter.*

This court adopted the opinion of the Court of International Trade in *Rosenthal-Netter,* which holds that in order to establish that a buying commission is deductible from dutiable value, "the [importer] has the burden of proving the existence of a *bona fide* agency relationship and that the charges paid were, in fact, *bona fide* buying commissions." 679 F. Supp. at 21. Upon examination of the record, we agree with the trial

court's finding that a *bona fide* agency relationship did not exist between NIC and NIAC. Thus, we conclude that NIAC's buying commission is not entitled to be deducted from the dutiable value of the imported vehicles and that the trial court did not err in granting the government's counterclaim.

CONCLUSION

The controlling authority of *McAfee* mandates that the transaction value of the imported vehicles at issue be based on the price of the sale from the manufacturer to the middleman. Additionally, the buying commission received by NIAC is not entitled to be deducted from dutiable value in the absence of a *bona fide* agency relationship. We reverse the trial court's grant of summary judgment, affirm the trial court's grant of the government's counterclaim, and remand the case with instructions to the trial court to enter judgment in favor of NIAC on its claim for reliquidation, subject to the government's counterclaim.

COSTS

Each party is to bear its own costs.

REVERSED-IN-PART, AFFIRMED-IN-PART, AND REMANDED

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 92–229)

HOSIDEN CORP., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANTS

Consolidated Court No. 91–10–00720

[Final determination by the International Trade Commission is remanded. Decision is reserved on plaintiffs' challenge to the final determination by the Department of Commerce, International Trade Administration.]

(Dated December 29, 1992)

Adduci, Mastriani, Meeks & Schill (*Louis S. Mastriani, Anri Suzuki,* and *Gregory C. Anthes*), for plaintiff Hosiden Corporation.

Graham & James (*Lawrence R. Walders* and *Brian E. McGill*), for plaintiffs Hitachi, Ltd., Hosiden Corporation, Matsushita Electric Industrial Co., Ltd., NEC Corporation, Seiko Epson Corporation, Sharp Corporation, and Toshiba Corporation.

Baker & McKenzie (*Thomas P. Ondeck* and *Kevin O'Brien*), for plaintiff Apple Computer, Inc.

O'Melveny & Myers (*Kermit W. Almstedt, Peggy A. Clarke, Greta L. H. Lichtenbaum,* and *Craig L. McKee*), for plaintiff International Business Machines Corporation.

Collier, Shannon, Rill & Scott (*Paul C. Rosenthal, Robin H. Gilbert,* and *Stephen A. Jones*), for plaintiff Advanced Display Manufacturers of America.

Vinson & Elkins L.L.P. (*Theodore W. Kassinger, Charles D. Tetrault,* and *Rosemary E. Gwynn*), for plaintiff Compaq Computer Corporation.

Pennie & Edmonds (*Arthur Wineburg* and *Marcia H. Sundeen*), for plaintiff Tandy Corporation.

Stuart M. Gerson, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Vanessa P. Sciarra*), with *Marguerite E. Trossevin,* of counsel, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for defendant.

Lyn M. Schlitt, General Counsel, *James A. Toupin,* Assistant General Counsel, United States International Trade Commission (*Paul R. Bardos*), for defendant.

Jones, Day, Reavis & Pogue (*John E. Benedict, David G. Schryver,* and *Thomas F. Cullen, Jr.*), for defendant-intervenor Texas Instruments Incorporated.

MEMORANDUM AND ORDER

GOLDBERG, *Judge:* Plaintiffs, Hosiden Corporation, et al., bring this consolidated action challenging the final affirmative antidumping determination by the United States Department of Commerce, International Trade Administration ("Commerce") in *High Information Content Flat Panel Displays and Display Glass Therefor From Japan,* 56 Fed. Reg. 32,376 (1991), the final affirmative injury determination by

the United States International Trade Commission ("Commission") in *High Information Content Flat Panel Displays and Subassemblies Thereof From Japan,* USITC Pub. 2413, Inv. No. 731–TA–469 (Aug. 1991), and the antidumping duty orders entered therefrom.

This matter is before the court pursuant to plaintiffs' motion for review of the administrative determinations upon the agency record under USCIT Rule 56.1. The court has jurisdiction under 28 U.S.C. § 1581(c) (1988). The court remands the Commission's determination. The court reserves decision on its review of the challenged Commerce determinations pending the remand results from the Commission.

BACKGROUND

On July 18, 1990, Advanced Display Manufacturers of America, Inc. ("Advanced Display") and its individual member companies, Planar Systems, Inc., Plasmaco, Inc., OIS Optical Imaging Systems, Inc., The Cherry Corporation, Electro-Plasma, Phototonics Technology, Inc., and Magnascreen Corporation, filed a petition with Commerce and the Commission. The petition alleged that imports of certain high-information content flat panel displays ("HIC FPDs") and subassemblies thereof from Japan were being sold in the United States at less than fair value and that an industry in the United States was materially injured, threatened with material injury, or materially retarded from being established by reason of such imports.

The Commission instituted a preliminary antidumping investigation on July 24, 1990. *High-Information Content Flat Panel Displays and Subassemblies Thereof From Japan,* 55 Fed. Reg. 30,042 (1990).

Commerce initiated an antidumping duty investigation on August 14, 1990. *High-Information Content Flat Panel Displays and Subassemblies Thereof From Japan,* 55 Fed. Reg. 33,146 (1990).

On September 4, 1990, the Commission issued a preliminary affirmative determination. The Commission found one like product for the imported merchandise – all types of HIC FPDs and subassemblies thereof. The Commission determined that there was a reasonable indication that the domestic producers of all types of HIC FPDs were materially injured by reason of alleged less than fair value imports of HIC FPDs and subassemblies thereof from Japan. *High-Information Content Flat Panel Displays and Subassemblies Thereof From Japan,* USITC Pub. 2311, Inv. No. 731–TA–469 (Preliminary) (Sept. 1990).

On February 21, 1991, Commerce issued a preliminary determination that all HIC FPDs and subassemblies thereof from Japan comprised a single class or kind of merchandise, and that the subject merchandise was being, or was likely to be, sold in the United States at less than fair value. *High-Information Content Flat Panel Displays and Subassemblies Thereof From Japan,* 56 Fed. Reg. 7008 (1991). In addition, Commerce preliminarily revised the scope of determination by limiting the definition of subassemblies to include only processed glass substrates, whether or not integrated with additional components. *Id.* Finally, Commerce ordered that cash deposits or a bond be required on the

subject imports in the amount of the estimated preliminary dumping margins, which ranged from 0 to 4.6 percent *ad valorem*. *Id.*

Following Commerce's affirmative preliminary determination, the Commission instituted a final material injury investigation on March 27, 1991. *High-Information Content Flat Panel Displays and Subassemblies Thereof From Japan,* 56 Fed. Reg. 12,741 (1991) (final antidumping investigation).

Commerce issued a final affirmative determination on July 16, 1991. *High Information Content Flat Panel Displays and Display Glass Therefor From Japan,* 56 Fed. Reg. 32,376 (1991) (final determination). In its determination, Commerce found that the imported HIC FPDs covered by the petition constituted four separate classes or kinds of merchandise: active-matrix liquid crystal displays ("AMLCD") FPDs; passive-matrix liquid crystal displays ("PMLCD") FPDs; gas plasma FPDs; and electro-luminescent ("EL") FPDs.

After an investigation of each of the four classes of merchandise, Commerce determined that no petitioner produced PMLCD FPDs. *High Information Content Flat Panel Displays and Display Glass Therefor From Japan,* 56 Fed. Reg. 32,376 (1991). Commerce then evaluated whether petitioners had standing to file a petition with respect to this class of merchandise. *Id.* In its standing determination, Commerce did not follow the Commission's preliminary finding that there was one like product for the subject imported merchandise, namely all HIC FPDs, but instead re-examined the factors generally considered by the Commission for "like product" determinations. Commerce found four distinct like products: domestic AMLCD FPDs; domestic PMLCD FPDs; domestic gas plasma FPDs; and domestic EL FPDs. *Id.* Since no petitioner produced the like product for imported PMLCD FPDs – domestic passive-matrix LCD FPDs – Commerce determined that the petitioners were not interested parties and did not have standing with respect to an investigation of PMLCD FPDs. Therefore, Commerce dismissed that part of the petition involving passive-matrix LCD FPDs. *Id.*

In its investigation of gas plasma FPDs, Commerce determined that such merchandise was not, and was not likely to be sold in the United States at less than fair value, and dismissed the investigation concerning such imported merchandise. *High Information Content Flat Panel Displays and Display Glass Therefor From Japan,* 56 Fed. Reg. 32,376 (1991).

In its investigation of AMLCD FPDs and EL FPDs, Commerce determined that each was being sold or was likely to be sold in the United States at less than fair value, as provided in section 735(a) of the Tariff Act of 1930, as amended (19 U.S.C. § 1673d(a)). *High Information Content Flat Panel Displays and Display Glass Therefor From Japan,* 56 Fed. Reg. 32,376 (1991). Commerce determined a weighted average margin of 62.67 percent for all imports of AMLCD FPDs, and 7.02 percent for all imports of EL FPDs. *Id.*

The majority of the Commission published its final affirmative determination in the Federal Register on September 5, 1991. *High-Information Content Flat Panel Displays and Subassemblies Thereof From Japan,* 56 Fed. Reg. 43,937 (1991); also published at *Certain High-Information Content Flat Panel Displays and Display Glass Therefor From Japan,* USITC Pub. 2413, Inv. No. 731–TA–469 (Aug. 1991). The Commission broadened Commerce's domestic like product finding and determined that there was one like product for AMLCD FPDs and EL FPDs viewed together, namely all domestic HIC FPDs and the display glass therefor. *Id.* The Commission then determined that the domestic producers of HIC FPDs and display glass therefor were materially injured by reason of cumulated imports of AMLCD FPDs and EL FPDs from Japan. *Id.*

On September 4, 1991, Commerce published antidumping duty orders on imports of AMLCD FPDs and EL FPDs and display glass thereof from Japan. *High Information Content Flat Panel Displays and Display Glass Therefor from Japan,* 56 Fed. Reg. 43,741 (1991).

Thereafter, this action was commenced. Advanced Display challenged several aspects of Commerce's less than fair value determination, while the remaining plaintiffs challenged both Commerce's and the Commission's determinations. In connection with the Commission's injury determination, the remaining plaintiffs argued that the Commission failed to conduct separate injury investigations regarding sales at less than fair value of AMLCD FPDs and EL FPDs individually. These plaintiffs also asserted that the Commission incorrectly broadened its determination of the domestic industry to include producers of all HIC FPDs.

Plaintiffs also contended that the Commission's determination of like product corresponding to the imported articles, and its material injury finding were not supported by substantial evidence. Because the court remands the case to the Commission based upon the Commission's preliminary interpretation of the governing statutes, the court need not address these arguments by plaintiffs at this time.

Discussion

A. *The Commission's Injury Analysis:*

Plaintiffs first claim that the Commission failed to conduct two investigations into whether individual domestic industries were injured "by reason of" imported AMLCD FPDs and EL FPDs, viewed independently of each other. Instead, the Commission evaluated whether a single domestic industry suffered material injury by reason of sales of imported AMLCD FPDs and EL FPDs, cumulated together. Plaintiffs argue that the Commission was required to separately investigate whether sales at less than fair value of AMLCD FPDs materially injured domestic producers of its like product, and whether domestic producers of a like product corresponding to EL FPDs were materially injured by sales of imported EL FPDs.

The Commission responds that it is not required to conduct separate investigations. The Commission maintains that according to statute its job is simply to evaluate whether domestic producers of a like product of the merchandise under investigation are being injured by reason of imports. The Commission need only determine "what is the like product, what is the domestic industry but there is no need for a separate determination with respect to each class or kind" of merchandise designated by Commerce. (Tr. to Oral Argument on August 13, 1992 at 146.) The Commission contends that it is up to the Commission to define "the number of like products that correspond to a class or kind of merchandise or the number of classes or kinds that correspond to a like product." (Commission Memorandum in Response to Plaintiffs' Motions for Judgment on the Agency Record "Commission Memorandum" at 11.)

The Commission bases its position on the assertions that Commerce's class or kind finding and the Commission's like product determination are unrelated. Commerce's class or kind determination only binds the Commission as to what imports are under investigation. The Commission's "like product definition need not duplicate exactly or be coterminous with Commerce's class or kind finding." (Commission Memorandum at 14 (citation omitted).) For example, the Commission has the statutory authority to find several like products corresponding to a single class or kind. *See Badger-Powhatan v. United States,* 9 CIT 213, 608 F. Supp. 653 (1985). Moreover, in *Cyanuric Acid and its Chlorinated Derivatives from Japan,* USITC Pub. 1513, Inv. No. 731–TA–136 (Final) (April 1984), the Commission treated three classes or kinds of merchandise as a single like product.

The Commission concludes that in this action, the Commission determined that one like product – all domestic HIC FPDs – corresponded to the totality of the merchandise under investigation. Since the determination of like product was identical for both AMLCD FPDs and EL FPDs, the Commission need not conduct two separate, and redundant, investigations into whether imports of AMLCD FPDs and imports of EL FPDs caused injury to domestic producers of the same like product.

However, "statutory interpretation begins with the language of the statute itself." *Pennsylvania Department of Public Welfare v. Davenport,* 495 U.S. 552, 557–558 (1990). "If the intent of Congress is clear [from the language of the statute], that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. National Resources Defense Council Inc.,* 467 U.S. 837, 842–843 (1984). The "traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress." *Serampore Industries Pvt. Ltd. v. United States Department of Commerce,* 11 CIT 866, 869, 675 F. Supp. 1354 (1987) quoting *Board of Governors of Federal Reserve System v. Dimension Financial Corp.,* 474 U.S. 361 (1986).

It is only "if the statute is silent or ambiguous with respect to the specific issue, [that] the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. Inc. v. National Resources Defense Council Inc.,* 467 U.S. 837, 843 (1984).

The court finds that in this case, the Commission's interpretation of its statutory duties were not in accordance with the plain language of the statute, and "alter[ed] the clearly expressed intent of Congress." *Serampore Industries,* 11 CIT at 866, 869.

Title 19 of the United States Code, Section 1673 (1988) provides that antidumping duties shall be imposed where:

> (1) the administering authority determines that *a class or kind* of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and
> (2) the Commission determines that –
>
> (A) an industry in the United States
>
> (i) is materially injured, or
> (ii) is threatened with material injury, or
>
> (B) the establishment of an industry in the United States is materially retarded,
>
> by reason of imports of *that merchandise* or by reason of sales (or the likelihood of sales) of that merchandise * * *."

(emphasis added).

Title 19 of the United States Code, Section 1677(4)(A) (1988) defines the term "industry" as the "domestic producers as a whole of a like product." Like product is in turn defined as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation * * *." 19 U.S.C. § 1677(10) (1988).

Title 19 of the United States Code, Section 1673 (1988) establishes distinct roles for Commerce and the Commission. Commerce must determine the scope of the investigation by determining the class or kind of merchandise subject to investigation. *See American NTN Bearing Manufacturing Corp. v. United States,* 14 CIT 320, 739 F. Supp. 1555 (1990). If Commerce finds that a class or kind of merchandise is being sold at less than fair value, the statute unequivocally provides that Commission then must determine whether a United States industry is being injured, threatened with injury, or materially retarded by reason of imports of *that* merchandise. The plain language of the statute therefore limits the Commission to individual determinations of whether a domestic industry producing products like each separate class or kind of imported article is being injured by each separate class or kind of imported merchandise designated by Commerce. Indeed, both the Commission in its regulation, 19 C.F.R. § 207.2(e) (1992), and the court in *Algoma Steel Corp. v. United States,* 12 CIT 518, 522–523, 688 F. Supp. 639 (1988), *aff'd,* 7 Fed. Cir. (T) 154, 865 F.2d 240 (1989), *cert. denied,*

492 U.S. 919 (1989), recognized that the Commission is so confined.[1]

The Commission's regulations define the term "injury" to mean:

> [m]aterial injury or threat of material injury to an industry in the United States, or material retardation of the establishment of an industry in the United States, by reason of imports into the United States of *a class or kind of merchandise which is found by the administering authority* to be * * * sold, or likely to be sold, at less than its fair value.

19 C.F.R. § 207.2(e) (1992) (emphasis added).

The court in *Algoma Steel Corp. v. United States,* 12 CIT 518, 522–523, 688 F. Supp. 639 (1988), *aff'd,* 7 Fed. Cir. (T) 154, 865 F.2d 240 (1989), *cert. denied,* 492 U.S. 919 (1989) stated in reference to the antidumping statute:

> [i]n applying this statute, [the Commission] does not look behind [Commerce's] determination, but accepts [Commerce's] determination as to which merchandise is in the class of merchandise sold at [less than fair value. The Commission], on the other hand, determines *what domestic industry produces products like the ones in the class defined by [Commerce]* and whether that industry is injured by the relevant imports.

The court finds the Commission's response unconvincing that regardless of the face of the statute, it may conduct a single investigation into like product because Commerce and the Commission's determinations are unrelated, and the Commission is not bound by Commerce's class or kind distinctions.

The court agrees with the Commission that clearly, both Commerce and the Commission have individual responsibilities. *See Torrington Co. v. United States,* 14 CIT 648, 747 F. Supp. 744 (1990), *aff'd* 10 Fed. Cir. (T) ____, 938 F.2d 1278 (1991). "It is settled law that the [Commission's] like product determination is separate and distinct from [Commerce's] determination of the class or kind of merchandise." *Id.* at 650 (citation omitted). Further, the Commission "has the right to make its own determination as to what should be considered a like product." *Id.* at 650–651 (citation omitted). The Commission may also properly find multiple like products within each class or kind of article defined by Commerce. *Sony Corp. of America v. United States,* 13 CIT 353, 712 F. Supp. 978 (1989); *American NTN Bearing Manufacturing Corp. v. United States,* 14 CIT 320, 739 F. Supp. 1555 (1990).

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[1] The court's ruling does not, of course, affect long settled law regarding the Commission's ability to determine the like product corresponding to each class or kind of article under investigation. The Commission's determination of which domestic product or products are "like" each class or kind of imported article is not limited in scope to that merchandise contained within Commerce's corresponding class or kind distinctions. *See Badger-Powhatan v. United States,* 9 CIT 213, 608 F. Supp. 653 (1985); *American NTN Bearing Manufacturing Corp. v. United States,* 14 CIT 320, 739 F. Supp. 1555 (1990). For example, the Commission may properly find multiple like products within each class or kind of article defined by Commerce. *Sony Corp. of America v. United States,* 13 CIT 353, 712 F. Supp. 978 (1989); *American NTN Bearing Manufacturing Corp.,* 14 CIT at 320. The Commission may also deviate from the contentions regarding the scope of like product contained in the petition, provided its "determinations were supported by substantial evidence." *Torrington Co. v. United States,* 14 CIT 648, 650, 747 F. Supp. 744 (1990), *aff'd* 10 Fed. Cir. (T) ___, 938 F.2d 1278 (1991).

However, the Commission's extension of its right to make an independent like product determination to grant itself immunization from Commerce's class or kind distinctions is unwarranted. The Commission *"does not have the authority to modify [Commerce's] finding of class or kind * * *." Torrington Co. v. United States,* 14 CIT at 648, 650 (emphasis added) (citation omitted). Unlike a finding by the Commission that multiple like products correspond to a single class or kind of merchandise, when it ignores Commerce's determination and conducts a single investigation, the Commission undermines Commerce's duties and fundamentally alters Commerce's finding of class or kind. By linking two classes of kinds of merchandise together for one investigation, the Commission essentially redraws Commerce's class or kind categories and decides in place of Commerce which articles fall within each class or kind of merchandise. For example, under the Commission's reasoning, if several classes or kinds of merchandise were involved, nothing prevented it from cumulating some classes or kinds and investigating those as a whole, while investigating others individually. The Commission's end result is a redefinition of Commerce's classes or kinds of merchandise that were to be investigated by the Commission.

The Commission's expansion and alteration of Commerce's class or kind determination can critically affect the outcome of its investigation. Cumulation of two or more classes or kinds of articles increases the diversity of merchandise for which the Commission seeks to find a "like product." This increase in diversity, of course, accordingly increases the totality of characteristics of the group – or class or kind – of merchandise for which the Commission determines a "like product." The Commission's definition of products "like" the newly created diverse class or kind of article under investigation is therefore expanded because it must take into account these increased characteristics.[2]

Correspondingly, the expanded definition of the domestic industry leads to a skewed causation determination. The Commission may find that the arbitrarily enlarged domestic industry was injured by reason of imports, when it would not have found injury to domestic industry producing a product like the actual class or kind of article designated by Commerce. The Commission may attribute injury caused solely by reason of imports of one class or kind of article to imports of another. For example, in this case, the Commission may have ascribed injury caused by imports of AMLCD FPDs to imports of EL FPDs, and vice versa.

Moreover, not only is the Commission's interpretation of its statutory responsibilities contrary to the statutory scheme, its construction is also inimical to Congress' grant of discretion to the Commission. The Com-

[2] A practical example perhaps best illustrates this result. According to the Commission's position, if Commerce determined that a class or kind of imported oranges and a separate class or kind of lemons were being sold at less than fair value, the Commission may, if it chooses, cumulate both classes or kinds together. The Commission would accordingly determine a "like product" corresponding to both oranges and lemons viewed as a group. Such a "like product" may well be all citrus fruits. However, had the Commission investigated each class or kind separately, the "like product" corresponding to the imported oranges would likely be all oranges, or a limited segment of citrus fruits. Similarly, the products "like" the imported lemons would not be all citrus fruits. The Commission's cumulation of the two classes or kinds of merchandise therefore results in an expanded definition of "like product."

mission's argument presumes that it may combine classes or kinds of merchandise without a finding of whether, for instance, EL FPDs and AMLCD FPDs, taken together, would have the same like product and injury determinations as each would viewed individually.

An agency's "[e]xpert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise,* the strength of modern government, can become a monster which rules with no practical limits on its discretion.' Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body." *Burlington Truck Lines v. United States,* 371 U.S. 156, 167 (1962) (quoting *New York v. United States,* 342 U.S. 882, 884 (1951); *Federal Communications Comm'n v. RCA Communications Inc.,* 346 U.S. 86, 90 (1953)) (citations omitted). An agency must "disclose the basis of its order" and "give clear indication that it has exercised the discretion with which Congress has empowered it." *Id.* at 168 (quoting *Phelps Dodge Corp. v. Labor Board,* 313 U.S. 177, 197 (1941)); *see also Bando Chemical Industries, Ltd v. United States,* No. 92–26 (CIT 1991). An agency "must make findings that support its decision, and those findings must be supported by substantial evidence." *Burlington,* 371 U.S. at 168. The agency must articulate a rational connection between the facts found and the choice made. *Id.* at 168.

In this case, the Commission made no finding whether or not combined classes or kinds of merchandise under investigation would lead to different like product and injury determinations than would individual inquiries. The Commission made no finding that a decision with this potential to affect the outcome of the final determination was within its discretion. The court can find no authority for the proposition that in this regard, Congress intended that the Commission may deviate from long settled law and make outcome determinative decisions of this nature without "findings that support its decision" and supporting those findings by substantial evidence.[3] *Id.* at 168.

In conclusion, based upon the plain language of the statute, supporting case law, and the record before the court, the court finds that the Commission must conduct separate material injury investigations for each class or kind of merchandise designated by Commerce. Upon remand, the Commission must individually determine the domestic industry – the domestic producers of a like product corresponding to imported AMLCD FPDs, and whether that domestic industry was injured by reason of imports of AMLCD FPDs alone. Secondly, the Commission must determine the domestic producers of the like product corresponding to EL FPDs, and whether that domestic industry was injured by reason of EL FPD importations.

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[3] A review of the record revealed no evidence demonstrating that cumulation was not determinative to the outcome of its investigation. Additionally, no evidence showed that if, in fact, cumulation affected its determination, the Commission found that such cumulation was warranted.

B. *The Commission's "Like Product" Determination:*

Plaintiffs also argue that the Commission's "like product" determination under 19 U.S.C. §§ 1673 and 1677 was flawed for several reasons. Plaintiffs contend that Commerce explicitly determined the like products corresponding to AMLCD FPDs and EL FPDs, and the Commission is bound by those findings. Plaintiffs further assert that the Commission expanded the domestic industry to include "similar" products in addition to "like" products. Finally, substantial evidence did not support the Commission's determination that the like product for AMLCD FPDs and EL FPDs was all HIC FPDs.[4]

Plaintiff's first contention can be dismissed with little amplification. Title 19 of United States Code, Section 1673a (1988) provides that Commerce shall determine whether an antidumping petition was properly filed by an interested party on behalf of a domestic industry. The term "interested party" includes "a manufacturer, producer, or wholesaler in the United States of a like product." 19 U.S.C. § 1677(9)(C) (1988). In this case, Commerce determined that FPDs under investigation constituted four "like products" for standing purposes.

Pursuant to 19 U.S.C. §§ 1673 and 1677, the Commission is to determine whether domestic producers of a "product which is like, or in the absence of like, most similar in characteristic and uses with, the article subject to an investigation" suffered injury by reason of imports. 19 U.S.C. §§ 1673, 1677(4)(A), 1677(10) (1988). Here, the Commission found only one "like product".

Plaintiffs argue that the Commission was bound by Commerce's "like product" determinations. However, "under the statutory scheme, [Commerce] and the Commission have separate and different, although related, duties and responsibilities in the administrative process by which dumping investigations are conducted and antidumping orders are issued." *Mitsubishi Electric Corporation v. United States*, 8 Fed. Cir. (T)____, ____, 898 F.2d 1577, 1579 (1990). In *Algoma Steel Corp. v. United States*, 12 CIT at 518, 520, the court indicated that:

> [i]t should also be noted that possibilities for [Commerce] and [the Commission] inconsistencies are built into the law. The very fact of separation of the two parts of the decisions required by the unfair trade laws may lead to superficial inconsistencies. As long as the inconsistencies resulting from the plain language of the statute do not lead to results which Congress could not have intended, they should be tolerated.

The court finds that Congress built into the plain language of 19 U.S.C. 1673 (1988) two "like product" determinations. While both Commerce and the Commission are required to find "like product" corresponding to the article under investigation, their determinations are expressly meant to serve separate goals Commerce determines the imported merchandise's "like product" in regard to its standing evalu-

[4] Because the court previously found that the Commission must conduct independent investigations for AMLCD FPDs and EL FPDs, this issue is rendered moot and need not be addressed.

ation, while the Commission finds "like product" in connection with its injury determination. Because Congress explicitly provided separate "like product" responsibilities for Commerce and the Commission, the court finds that inconsistencies between Commerce and the Commission in determining "like product" such as those which arose in the case at bar are not "results which Congress could not have intended." *Id.*

Plaintiffs also assert that the Commission is bound by Commerce's determination through the doctrine of collateral estoppel. Under the doctrine, relitigation of factual matters is precluded when four factors are present: the issue previously adjudicated is identical with the present issue, the factual matter was actually litigated in the first action, the previous determination of that issue was necessary to the end-decision previously made, and the party precluded was represented by counsel in the prior action. *PPG Industries, Inc. v. United States,* 14 CIT 522, 538, 746 F. Supp. 119, (1990).

Clearly, in the action before the court the issue was not identical in both proceedings. Commerce's "like product" determination concerned a petitioner's standing to bring an action, while the Commission's was made in regard to its injury finding. Moreover, Commerce's determination was not made in an adjudicatory proceeding. "Congress has stipulated than antidumping and countervailing duty proceedings are investigatory rather than adjudicatory in nature." *Avesta AB v. United States,* 12 CIT 493, 513, 689 F. Supp. 1173 (1988) (citation omitted).

Consequently, the court finds that the Commission was not bound by Commerce's determination of "like product," and the Commission properly determined on its own the "like product" corresponding to the imported merchandise.

The last question the court must address, therefore, is plaintiffs' argument that the Commission may never expand the definition of the domestic industry to include "similar" products when domestic producers manufactured products "like" the merchandise under investigation, as it did here. Plaintiffs essentially contend that because AMLCD FPDs and EL FPDs precisely identical to the articles under investigation were produced domestically, the Commission was prevented as a matter of law from enlarging its "like product" determination to include "similar" products such as all HIC FPDs, or some other segment of the HIC FPD industry.

Statutory and case law, the legislative history of the Trade Agreements Act of 1979, and previous practice by the Commission provide otherwise. The court accordingly finds that the Commission may interpret the term "like product" to include products other than those precisely identical to the article under investigation, provided its like product determination is "reasonable and supported by the evidence." *Torrington,* 14 CIT at 648, 651.

Title 19 of United States Code, Section 1677(10) (1988) defines like product as one that "is like, or in the absence of like, most similar in characteristics and uses" with the article under investigation.

As noted in the legislative history of the Trade Agreements Act of 1979, the like product standard should not be interpreted "in such a narrow fashion as to permit minor differences in physical characteristics or uses to lead to the conclusion that the product and article are not "like" each other * * *." S. Rep. No. 249, 96th Cong., 1st Sess. 90–91 (1979), *reprinted in* 1979 U.S.C.C.A.N. 476–477. Neither should the definition of like product "be interpreted in such a fashion as to prevent consideration of an industry adversely affected by the imports under investigation." S. Rep. No. 249, 96th Cong., 1st Sess. 9091 (1979), *reprinted in* 1979 U.S.C.C.A.N. 477.

The language of 19 U.S.C. § 1677(10) does not definitively indicate how Congress intended the Commission to interpret the terms "like" and "most similar." However, the legislative history specifically provides that Congress did not intend for the Commission to interpret the term "like product" to mean "only those products that are precisely identical" to the article under investigation. Congress indicated that the like product may contain "minor differences in physical characteristics or uses." S. Rep. No. 249, 96th Cong., 1st Sess. 90–91 (1979), *reprinted in* 1979 U.S.C.C.A.N. 476. Moreover, interpreting the term "like product" so narrowly as to include only "precisely identical" products would well "prevent consideration of an industry adversely affected by the imports under investigation." S. Rep. No. 249, 96th Cong., 1st Sess. 90–91 (1979), *reprinted in* 1979 U.S.C.C.A.N. 477. An industry that produces products which directly compete with the imported merchandise, but contain only minor differences from the article under investigation, would be excluded from consideration.

The court's determination that the Commission's "like product" determination may include products with minor differences from the imported article as well as precisely identical merchandise is supported by previous determination of this court and the Commission. In *Asociacion Colombiana de Exportadores de Flores v. United States,* 12 CIT 634, 638, 693 F. Supp. 1165 (1988), this court recognized that the Commission's definition of "like product" may encompass a broad interpretation of the term "like product" when it noted that "[i]t is up to [the Commission] to determine objectively what is a minor difference." Every like product determination must be based upon the "unique facts of each case" "and on the particular record at issue." *Id.* at 638.

The Commission itself has also previously interpreted the term "like" to encompass both "precisely identical" and "like" products. In *Portable Electric Nibblers From Switzerland,* USITC Pub. 1108, Inv. No. 731–TA–35 (Preliminary) (Nov. 1980), the Commission defined the domestic like product for imported 14 and 18 gage electric nibblers as all portable electric nibblers. The Commission noted that "[t]he concept of likeness does not require exact identity * * *." *Id.* at 5.

In summary, the court finds that the Commission's interpretation of 19 U.S.C. § 1677(10), that as a matter of law, products "like" the article under investigation may include products with "minor differences in

physical characteristics or uses" from the imported article, is reasonable and permissible. The court emphasizes, however, the Commission may neither indiscriminately nor habitually include products with "minor differences in physical characteristics or uses" from the imported articles in its definition of "like product." Determinations by the Commission regarding the scope of the "like product" must, of course, be supported by the evidence. *Torrington*, 14 CIT at 648, 651. Therefore, any finding by the Commission that the like product corresponding to an imported article included products with minor differences in addition to merchandise precisely identical to the article under investigation must be so supported. Similarly, factual determinations by the Commission defining differences which are in fact "minor" must be likewise supported by substantial evidence.

Accordingly, upon remand in this action, any expansion by the Commission upon its determination of the products "like" imported AMLCD FPDs and "like" imported EL FPDs to include products with "minor differences in physical characteristics or uses" from the imported FPDs, and any factual findings delineating "minor differences" must be supported by substantial evidence.

CONCLUSION

For the reasons provided above, this court holds that the Commission's final determination regarding high information content flat panel displays and subassemblies from Japan was not supported by substantial evidence and not in accordance with law. Accordingly, the Commission's determination is remanded to the Commission. The court's decision is reserved on plaintiffs' challenge to the final determination issued by Commerce.

(Slip Op. 92–230)

HOLMES PRODUCTS CORP., PLAINTIFF *v.* UNITED STATES AND U.S. INTERNATIONAL TRADE COMMISSION, DEFENDANTS

Court No. 92–01–00013

[Remand].

(Decided December 30, 1992)

Dickstein, Shapiro & Morin (*Arthur J. LaFave III, Douglas N. Jacobsen*), for plaintiff.
Lyn M. Schlitt, General Counsel, United States International Trade Commission, *James A. Toupin*, Assistant General Counsel (*Judith M. Czako*), for defendants.

OPINION

RESTANI, *Judge:* Plaintiff, Holmes Products Corporation ("Holmes"), challenges the final affirmative injury determination by the Interna-

tional Trade Commission ("ITC") in the antidumping duty investigation of oscillating fans from the People's Republic of China ("PRC"). *See Certain Electric Fans from the People's Republic of China,* Inv. No. 731–TA–473 (Final), USITC Pub. 2461 (Brunsdale, Acting Chair, dissenting) ("*Final Det.*"); 56 Fed. Reg. 64,642 (ITC 1991). The case is remanded to ITC for further explanation of the evidence of the nexus between imports and injury.

I. Background

Holmes is a United States corporation that sells electric oscillating fans in the United States. Most of Holmes' fans are manufactured in the PRC by Esteem Industries, Ltd. ("Esteem"), a Hong Kong company with a factory in southern China.

On October 31, 1990, Lasko Metal Products, Inc. ("Lasko") filed an antidumping duty petition with the International Trade Administration of the United States Department of Commerce ("ITA" or "Commerce") and ITC. The petition alleged that certain electric oscillating and ceiling fans from the PRC were being dumped in the United States at less than fair value ("LTFV"), and were causing material injury to a United States industry.

On October 18, 1991, Commerce announced its final antidumping duty determination. It found that oscillating and ceiling fans were separate classes or kinds of merchandise, and published dumping margins as to each. After correction of errors, the final dumping margins for the four producers investigated were de minimis for three producers (Wuxi Electric Fan Factory, Durable Electrical Metal Factory Ltd. and Polaray Industrial Corporation), and 0.79 percent for Holmes/Esteem. *Oscillating Fans and Ceiling Fans From the People's Republic of China,* 56 Fed. Reg. 64,240 (Dep't Comm. 1991) (antidumping duty orders and amendments to final determinations); *Oscillating Fans and Ceiling Fans from the People's Republic of China,* 56 Fed. Reg. 55,271, 55,282–83 (Dep't Comm. 1991) (final determinations of LTFV sales).

On December 2, 1991, ITC issued its final determination. A majority found that United States industries were materially injured by reason of LTFV imports of oscillating and ceiling fans from the PRC. *Final Det.,* at 20. Holmes filed this action, challenging the determination concerning oscillating fans. The determination concerning ceiling fans was the subject of a separate action. *Encon Indus., Inc. v. United States,* 16 CIT ___, Slip Op. 92–164 (Sept. 24, 1992).

II. ITC'S Final Determination

ITC first defined the domestic like product and the domestic industry. As in the preliminary determination, it found two domestic like products, oscillating fans and ceiling fans. *See Final Det.,* at 6. In a change from the preliminary determination, however, ITC found that the essential characteristic of oscillating fans is "oscillation and the consequent ability to provide a multi-directional cooling air flow and air circulation." *Final Det.,* at 12. Thus, window, box, and other household

fans, which do not oscillate, were excluded from the oscillating fan like product. *See Final Det.*, at 11–12.

ITC then examined the condition of the domestic industry during the period of investigation and interim periods, and found material injury.

Finally, ITC considered whether material injury to the domestic industry occurred "by reason of" LTFV imports. ITC found that LTFV imports have captured a significant and increasing share of the U.S. market. *Final Det.*, at 20. The price information was confidential, and ITC discussed it only in general terms. ITC noted mixed pricing trends, and found that pricing information supports an affirmative determination because "price is the most important factor in deciding between imported and domestically produced oscillating fans." *See Final Det.*, at 19. ITC concluded that LTFV imports of oscillating fans are a cause of material injury to the domestic producers of the like product. *Final Det.*, at 20.

III. Standard of Review

ITC's determination will be upheld unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988).

IV. Discussion

1. *Nonsubject Firms and Merchandise:*

To determine whether material injury has occurred by reason of the LTFV imports under investigation, ITC considers the volume of imports, their effect on domestic prices and production, and other relevant factors. 19 U.S.C. § 1677(7) (1988). Holmes claims error because some of the data on which ITC relied pertained to firms and merchandise that were not subject to investigation. The government responds that Holmes has waived these arguments.

a. *Waiver:*

Holmes makes three arguments, which the government claims have been waived. Holmes claims ITC erred in the following respects: first, it considered imports from manufacturers not investigated by Commerce; second, it relied on the official import statistics, which included nonsubject merchandise; and third, it considered pricing and lost sales information pertaining to excluded firms. Holmes claims that it raised each of these issues before ITC. The record, however, indicates that only the third argument was clearly raised.

In its prehearing brief, Holmes argued that ITC should not consider imports produced by companies excluded from ITA's determination of LTFV sales. *Holmes' Prehearing Brief*, at 12–13, Administrative Record, List 2, Confidential Document ("C.R.") 17.[1] Holmes did not raise arguments about noninvestigated firms or nonsubject merchandise.

[1] At the time Holmes filed its prehearing brief, ITA had excluded only Durable and Polaray from the investigation; Wuxi was excluded at a later date.

Holmes claims these arguments were implicitly raised by an exhibit attached to its prehearing brief, in which it computed import volume based on data from firms actually investigated and found to be selling at LTFV. This exhibit, however, is insufficient to alert ITC to Holmes' arguments. Thus, it appears that Holmes did not raise, either explicitly or implicitly, the first and second arguments made here.

To avoid waiver, Holmes claims that its first argument presents an issue of law, which may be considered for the first time on review by this court. It also claims that failure to raise its second argument is excused because ITC actually considered the issue.

When a party who participated in the administrative proceeding asserts a new claim that is purely legal, the court has discretion to consider it. *Hercules, Inc. v. United States,* 11 CIT 710, 735, 673 F. Supp. 454, 476 (1987); *see Rhone Poulenc, S.A. v. United States,* 7 CIT 133, 136, 583 F. Supp. 607, 611 (1984). The court must take into account any prejudice that may result from failure to raise the issue at the administrative level. *Hercules,* 11 CIT at 735, 673 F. Supp. at 476. Holmes' first argument – that ITC may not consider effects on the domestic industry of imports from firms that were not investigated – presents an issue of law. Nevertheless, as Holmes offers no compelling reason for failure to raise the argument before ITC, and as the government would undoubtedly suffer prejudice if the argument were considered for the first time in this forum, the court finds that Holmes' first argument is waived.

A party may be excused from failure to raise an argument before the administrative agency as long as the agency in fact considered the issue. *See Washington Assoc. for Television and Children v. F.C.C.,* 712 F.2d 677, 682 (D.C. Cir. 1983); *see Al Tech Specialty Steel Corp. v. United States,* 11 CIT 372, 377 n.5, 661 F. Supp. 1206, 1210 n.5 (1987) (dicta). Thus, exhaustion may be excused if the issue was raised by another party, or if it is clear that the agency had an opportunity to consider it. *See Washington Assoc.,* 712 F.2d at 682 n.10; *Office of Communication of United Church of Christ v. F.C.C.,* 465 F.2d 519, 523 (D.C. Cir. 1972). Holmes claims the agency staff itself raised the issue of nonsubject merchandise.[2] The ITC staff was aware that the official import statistics included nonsubject merchandise, and could be overstated. Final Staff Report at A–87, C.R. 28; Hearing Transcript at 63, Administrative Record, Public Document 200. Nevertheless, the staff chose to rely on the statistics, finding them more reliable than the questionnaire responses. Final Staff Report at A–87, C.R. 28. None of the parties made any objection. To assume ITC treated this as a serious issue, in the absence of objections, goes too far. ITC's determination does not reflect any controversy on the issue. In summary, only Holmes' third argument will be considered here; its first and second arguments have been waived.

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[2] Holmes also claims Lasko raised the issue in its prehearing and posthearing briefs. It does not appear, however, that the issues were raised by the briefs. *See* Petitioner's Prehearing Brief, at 22, C.R. 14; Petitioner's Posthearing Brief, C.R. 23.

b. *Effect of Imports on Domestic Prices and Production:*

Holmes argues that ITC failed to exclude from its determination evidence of prices charged by two excluded firms, and sales lost to these firms. The government concedes that the price tables contained data pertaining to two excluded firms. It argues, however, that the error was harmless because, even without this data, the trends of mixed underselling and overselling do not change. With respect to the lost sales data, the government does not specifically concede or deny error, but argues that ITC did not rely on lost sales.

ITC did not find evidence of price depression or suppression, nor did it find confirmed lost sales. The only evidence it found of the nexus between imports and injury to the domestic industry was "mixed overselling and underselling." Although ITC need not find a consistent pattern of underselling to make an affirmative determination (*see Florex v. United States,* 13 CIT 28, 40, 705 F. Supp. 582, 593 (1989)), it must demonstrate that, under the circumstances, mixed trends are adequate to establish causation. In this case, the pricing information was confidential, and ITC discussed it only in the most general terms. Now, because ITC has disclosed so little of its reasoning on price effects, the court is not in a position to review that aspect of the determination. The case is, therefore, remanded so that ITC may give a further explanation of its determination on causation; if ITC finds itself constrained by the confidential nature of the price information, it should issue a confidential decision. On remand, ITC will eliminate price and lost sales data pertaining to excluded firms.

2. *Other Factors, Impact of the Dumping Margin, and Like Product:*

Holmes argues that the domestic industry was injured not by LTFV imports from the PRC, but by other factors such as decreasing U.S. demand, and declining labor productivity and capacity utilization. Holmes also argues that PRC imports were not a cause of injury because they merely replaced imports from other countries. As the government correctly points out, Holmes is offering alternative interpretations of the evidence in the record, but ITC is not to weigh the various causes of injury. A cause that contributes to material injury, even minimally, is sufficient. *Encon,* 16 CIT at ____, Slip Op. 92–164, at 5 (citations omitted). If on remand ITC finds that PRC imports caused injury and substantial evidence supports the finding, the determination will be sustained.

Holmes argues that the ITC majority erred by disregarding the negligible price impact of the dumping margin. Holmes concedes that ITC is not required to consider the dumping margin. Holmes argues, however, that the rule is a "prescription for * * * arbitrary and capricious" decision making. *Holmes' Brief,* at 32. The case law on this point is clear. ITC has *discretion* to consider the dumping margin; no cases *require* consideration of the margin, even when it is extremely low. *See Hyundai Pipe Co., Ltd. v. U.S. Int'l Trade Comm'n.,* 11 CIT 117, 121, 670 F. Supp. 357, 360 (1987).

Finally, Holmes argues that ITC erred in excluding non-oscillating fans (floor, window, wall and box fans) from the domestic like product. Holmes claims these fans differ only in minor respects from oscillating fans. ITC's determination of the like product rested on its finding that the essential characteristic of oscillating fans was their ability to oscillate and cool air in many directions. This finding is supported by substantial evidence, and will not be disturbed.

V. Conclusion

The case is remanded to ITC to set forth its reasoning concerning causation with greater specificity, and to exclude price and lost sales data for firms that were excluded from ITA's determination.

(Slip Op. 92–231)

BROTHER INDUSTRIES, LTD., BROTHER INTERNATIONAL CORP., AND BROTHER INDUSTRIES (USA), INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND SMITH CORONA CORP., DEFENDANT-INTERVENOR

Court No. 91–12–00862

[Commerce determination affirmed.]

(Dated December 30, 1992)

Tanaka Ritger & Middleton (*H. William Tanaka* and *Patrick F. O'Leary*) for plaintiff.

Stuart M. Gerson, Assistant Attorney General, *David M. Cohen*, Director, United States Department of Justice, Civil Division, Commercial Litigation Branch (*Marc E. Montalbine*), *Jeffery C. Lowe*, United States Department of Commerce, Office of the Chief Counsel for Import Administration, of Counsel, for defendant.

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., Julie B. Chasen* and *Robert A. Weaver*) for defendant-intervenor.

Opinion

RESTANI, *Judge:* Plaintiffs, Brother Industries, Ltd., et al. (collectively "Brother"), challenge the Commerce Department's determination that Smith Corona Corporation ("Smith Corona") is an interested party with standing to file a petition requesting an anticircumvention proceeding. The court finds that Brother's challenge to standing is ill founded.

Background

On March 18, 1991, Smith Corona filed a petition under 19 U.S.C. § 1677j (1988) with the Department of Commerce, International Trade Administration ("ITA" or "Commerce") alleging that Brother was circumventing an antidumping duty order issued in *Portable Electric Typewriters From Japan*, 45 Fed. Reg. 30,618 (Dep't Comm. 1980) (antidumping duty order). This court has upheld past decisions of Com-

merce finding that this order covered not only portable electric typewriters (PETs), but also portable automatic typewriters (PATs) and certain portable word processors (PWPs). *See Matsushita Electric Industrial Co. v. United States,* 16 CIT ____, ____, 787 F. Supp. 1461, 1465 (1992); *Smith Corona Corp. v. United States,* 12 CIT 854, 867, 698 F. Supp. 240, 250–51 (1988), *aff'd in part, rev'd in part on other grounds,* 915 F.2d 683 (Fed. Cir. 1990).

In its final negative anticircumvention determination, Commerce decided that Smith Corona, as a manufacturer of a like product, had standing to bring a petition alleging circumvention of antidumping duty orders. *Portable Electric Typewriters From Japan,* 56 Fed. Reg. 58,031, 58,032, 58,038–39 (Dep't Comm. 1991) (final determ.); *see also* Administrative Record at Reel 2, Frames 00943A, 001573A (ITA memoranda dated Sept. 3, 1991 and Nov. 8, 1991).

Standard of Review

Commerce's determination will be upheld unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Commerce's interpretation of the relevant statutes and regulations will be sustained if the interpretation is "'sufficiently reasonable' to be accepted by a reviewing court." *Zenith Radio Corp. v. United States,* 437 U.S. 443, 450 (1978).

Discussion

As a preliminary matter, it should be noted that Brother prevailed in its contention that it was not circumventing the antidumping duty order at issue. *See Portable Electric Typewriters,* 56 Fed. Reg. at 58,040. Thus, the dispute with regard to standing will be moot unless Smith Corona successfully challenges Commerce's substantive determination upon appeal.

The statute pertaining to petitions alleging circumvention, 19 U.S.C. § 1677j (1988), does not contain a standing provision. Commerce concluded in this case that the "interested party" standing requirement of a related provision of the statute applies to such petitions. *Portable Electric Typewriters,* 56 Fed. Reg. at 58,032. Commerce also has the parallel authority under 19 U.S.C. § 1673a(a)(1) (1988) to self-initiate proceedings when circumvention is suspected. The court has held that the self-initiation provision may be a basis for continuing an original investigation if there is a technical failure of standing to file a petition. *Citrosuco Paulista, S.A. v. United States,* 12 CIT 1196, 1203, 704 F. Supp. 1075, 1084 (1988); *see also Suramerica de Aleaciones Laminadas, C.A. v. United States,* 10 Fed. Cir. (T) ____, ____, 966 F.2d 660, 667 (1992) ("Commerce has broad discretion in deciding when to pursue an investigation"). The court need not reach issues involving self-initiation as it finds no technical failure of standing.

Standing requirements are not stringent. A petitioner such as Smith Corona need only be "a manufacturer, producer, or wholesaler in the United States of a like product" to be considered an interested party. 19

U.S.C. § 1677(9)(C) (1988) (definition of "interested party"). The legislative history indicates that standing requirements are to be construed liberally. *See* S. Rep. No. 249, 96th Cong., 1st Sess. 63 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 449; *Brother Industries (USA) v. United States,* 16 CIT ___, ___, 801 F. Supp. 751, 757 (1992), *appeal docketed,* No. 93–1010 (Fed. Cir. Sept. 14, 1992); *Citrosuco Paulista,* 12 CIT at 1203, 704 F. Supp. at 1083–84.

First, the court finds that Commerce's failure to verify data submitted by Smith Corona in determining whether Smith Corona had standing was not improper. Commerce, in reviewing standing, need not establish precise numerical values, as it must in setting dumping margins. *Compare* 19 U.S.C. § 1673a(b)(1) (1988) *and* 19 U.S.C. §§ 1677a, 1677b (1988). Thus, a different level of "verification" is appropriate. *See id.* at § 1677e(b). In this case, Commerce found a tour of Smith Corona's plant sufficient to establish interestedness, in that Commerce was able to observe relevant production and related activities at the plant. Given the level of activity, it was not unreasonable for Commerce to decline to undertake a painstaking review of Smith Corona's business records. Commerce simply did not see any glaring flaw in Smith Corona's allegations which would reduce its position to one of little or no stake in the proceedings. *See Brother,* 16 CIT at ___, 801 F. Supp at 757. Commerce acted well within its discretion.

Second, Commerce did not misapply the six-factor test for determining who is an interested party.[1] All parties agree that the test, which was originally devised by the International Trade Commission, is appropriate. *See also id.* at ___, 801 F. Supp. at 758 (upholding ITA's use of the six-factor test). There was substantial evidence in the record supporting the conclusion that the value added in the United States, the investment in plants and equipment, and employment were substantial at the time of the petition filing. The amounts more than satisfy the standing requirements discussed by the court in its recent *Brother* opinion. *Id.* at ___, 801 F. Supp. at 757. Conflicting evidence submitted by Brother did not sufficiently undercut that provided by Smith Corona so as to warrant a different outcome. Furthermore, it was not error for Commerce to consider research and development as a separate factor or in determining the value added in the United States. Research and development should be considered. This factor simply may not be elevated out of all proportion when mature products, such as those at issue, are involved. *See id.* at ___, 801 F. Supp. at 757–58.

Even though some of Smith Corona's data appear to be in error, no facts raised by Brother on the record would provide an acceptable reason for Commerce to reverse its position, thus remand is not warranted for reconsideration of corrected data.

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[1] The factors are as follows: (1) the extent and source of a firm's capital investment; (2) the technical expertise involved in the production activity in the United States; (3) the value added to the product in the United States; (4) employment levels; (5) the quantity and types of parts sourced in the United States; and (6) any other costs and activities in the United States directly leading to production of the like product. *Brother,* 16 CIT at ___, 801 F. Supp. at 755.

Finally, Commerce is not required to abandon its court-approved scope decisions and segregate the class into three different like products for purposes of this analysis. While decisions as to the class of imported merchandise may differ from determinations as to the domestic like product, the particular scope determinations at issue, which grouped together PETs, PATs, and certain PWPs were very similar to a like product analysis. Commerce did not err in relying on these decisions, in the absence of any serious challenge based on product differences. Thus, so long as Smith Corona manufactures or produces any one of the three like products, as it does, it is an interested party.[2] Accordingly, Commerce's standing determination is sustained.

(Slip Op. 92–232)

BROTHER INDUSTRIES (USA), INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND SMITH CORONA CORP., DEFENDANT-INTERVENOR

Court No. 91–11–00794

[Motion for stay pending appeal denied.]

(Dated December 30, 1992)

Hogan & Hartson (*Lewis E. Leibowitz, Steven J. Routh* and *Joanne L. Leasure*); *Tanaka & O'Leary* (*Patrick F. O'Leary*), for plaintiff.

Stuart M. Gerson, Assistant Attorney General, *David M. Cohen*, Director, United States Department of Justice, Civil Division, Commercial Litigation Branch (*Patricia L. Petty*); *Dean A. Pinkert*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr.* and *Charles A. St. Charles*), for defendant-intervenor.

OPINION

RESTANI, *Judge:* Defendant-intervenor Smith Corona Corporation moves for a stay pending appeal of the judgment entered in this matter ordering the Commerce Department to complete its inquiry into plaintiff's standing to file an antidumping petition. *See Brother Industries (USA), Inc. v. United States*, 16 CIT ____, ____, 801 F. Supp. 751, 759 (1992), *appeal docketed*, No. 93–1010 (Fed. Cir. Sept. 14, 1992). The government supports the motion.

Brother's first basis for opposition is that the judgment entered is not a final appealable judgment and therefore stay pending appeal would be improper. *See Philip Brothers, Inc. v. United States*, 10 CIT 448, 640 F. Supp. 261 (1986). While the Court of Appeals has taken a strict view of finality for purpose of appeal of international trade decisions (*see Cabot Corp. v. United States*, 4 Fed. Cir. (T) 80, 83, 788 F.2d 1539, 1543 (Fed. Cir. 1986); *Badger-Powhatan v. United States*, 5 Fed. Cir. (T) 72, 75, 808 F.2d 823, 825 (Fed. Cir. 1986)), this action may be factually distinguish-

[2] Brother alleges Smith Corona only manufactures PATs in the United States.

able from the cited cases and the law as to finality generally may have shifted somewhat.[1] We need not resolve these issues here. If the judgment is not an appealable one, the agency would be compelled to proceed as it would in the absence of a stay of a final judgment. *See Brother Industries (USA), Inc. v. United States,* 16 CIT ____, Slip Op. 92–211 (Nov. 30, 1992). As the stay will not be granted because of the reasons discussed *infra,* the outcome is the same as it would be if the judgment were not final.

Brother also contends that the defendants have failed to satisfy the traditional four-part test for a stay. The court agrees.

As to the chances of success on appeal, Smith Corona has articulated the view that the court erred because it did not remand this matter for a new Commerce determination on Brother's status as an interested party. As the court found that no reasonable interpretation of the record would support a finding of non-interestness under existing precedent, remand would not have been proper.[2]

Assuming that the decision writer may have difficulty seeing potential error in her opinion, the court is more concerned with evidence of irreparable harm and the hardships to the parties. Given the extraordinary amount of time and expense "Japanese" owned Brother and "British" owned Smith Corona have spent for more than a decade warring over trade issues, including the issue of who represents the "American" industry, the court has a difficult time perceiving the irreparable harm to Smith Corona in participating in one more investigation. Moreover, Smith Corona has provided no detailed financial information which would demonstrate-such harm.

The balance of hardships also does not favor Smith Corona. There has been a preliminary finding of injury. Any delay in obtaining antidumping relief presumably injures Brother. Smith Corona will be subjected to whatever duties are found owing under law. This is not a legally cognizable hardship.

If there is a public interest issue, it is in avoiding delay in obtaining relief from injury due to unfairly traded imports. The "countervailing" interest is in avoiding unnecessary waste of energy and expense, but no one has made a good case that denial of the stay likely would cause such a waste. While the government in particular has an understandable interest in avoiding administrative action if there is a *possibility* that appeal will moot its efforts, that is not a sufficient ground for a stay. The government raises no other grounds and Smith Corona has failed in its efforts to meet the four-part test.

ORDERED, motion for stay pending appeal denied.

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[1] In a recent decision, the Court of Appeals retreated from its position in *Cabot,* and held that remands may or may not be final, depending on their nature. *Travelstead v. Derwinski,* 978 F.2d 1244, 1249 (Fed. Cir 1992) (citing *Sullivan v. Finkelstein,* 496 U.S. 617 (1990)).

[2] The court found that each underlying factual determination made by Commerce was supported. It was the ultimate application of the law to the facts which produced the erroneous result. *See Brother,* 16 CIT at ___, 801 F. Supp. at 758–59.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C92/202 12/23/92 Aquilino, J.	Cosco, Inc.	91–8–00554	6307.90.95 7%	A6307.90.95 Free of duty	Agreed statement of facts	Brownsville Man made fiber infant carriers
C92/203 12/23/92 Aquilino, J.	Service Cycle Supply Corp.	91–9–00643	732.24 11%	732.18 5.5%	Agreed statement of facts	Baltimore All-terrain style bicycles
C92/204 12/23/92 Aquilino, J.	Teradata Corp.	92–7–00499	8471.20.0090–0 3.9%	8471.99.1500–8 Free of duty	Agreed statement of facts	Chicago Processors IFPs and AMPs, Part No. A29–1066–001 A and Part No. A29–1095–001 A
C92/205 12/29/92 Aquilino, J.	A.N. Deringer, Inc.	91–1–00042	9024.10.00 4.8%	9801.00.10 Free of duty	Agreed statement of facts	Jackman Pipe scanner, serial number SN0015
C92/206 12/31/92 Watson, J.	Astec USA (HK), Ltd.	88–08–00672–S	682.60 3.6% or 3%	676.54 Free of duty	Digital Equipment Corp. *v.* U.S. 889 F.2d, 267 1989	San Fancisco Computer Supplies
C92//207 12/31/92 DiCarlo, J.	Mattel, Inc.	87–11–01121	737.95 737.40 8.3%	912.20 Free of duty	Mattel, Inc. *v.* U.S. 733 F.Supp. 1503, (1990) reversed 926 F.2d 1116 (1991)	New York Various toy articles valued not over 5¢ unit

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